

JL

**R E P O R T S**  
OF  
**SIR GEORGE CROKE, KNIGHT,**  
FORMERLY ONE OF THE **LAW**  
**J U S T I C E S** **LIBRARY.**  
OF THE  
COURTS of KING'S-BENCH and COMMON-PLEAS,  
OF SUCH  
**S E L E C T C A S E S**  
AS WERE ADJUDGED IN THE SAID COURTS DURING  
**THE REIGN OF CHARLES THE FIRST.**

COLLECTED AND WRITTEN IN FRENCH,  
By **H I M S E L F**;  
REVISED AND PUBLISHED IN ENGLISH,  
By **SIR HARBOTTLE GRIMSTON, BARONET,**  
MASTER OF THE ROLLS.

---

**THE FOURTH EDITION, CORRECTED,**  
WITH  
**MARGINAL NOTES and REFERENCES to the LATER REPORTS,**  
**AND OTHER BOOKS OF AUTHORITY,**  
By **THOMAS LEACH, ESQ.**  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

D U B L I N:

PRINTED FOR E. LYNCH, P. WOGAN, L. WHITE, P. BYRNE, W. M'KENZIE,  
J. MOORE, W. JONES, H. WATTS, AND J. RICE.

M.DCC.XCIII



England: Reports

2

R E P O R T S

OF

SIR CHARLES ROKE, KNIGHT,

FIRST

SELECT CASES

AND

COURTS OF KING-BENCH AND COMMON-PLEAS

IN THE REIGN OF

CHARLES THE FIRST

# INTRODUCTION.

**K**ING JAMES departed this life upon the twenty-seventh day of *March*, in the year of Our Lord 1625, by whose demise all the Justices patents (a) became void; whereupon King *Charles* signified his pleasure to the Lord Keeper, that all in judicial places should retain them as before, and be new empowered. And accordingly SIR RANDOLPH CREW, Chief Justice of the King's Bench, received a new writ, and SIR HENRY HOBART, Chief Justice of the Common Pleas, a new patent, and were sworn *de novo*. The same day also SIR THOMAS COVENTRY, Attorney General, and SIR ROBERT HEATH, Solicitor General to the late King, had new patents sent them, and were again sworn. And like patents were made for the other Justices, with recital of their several places (as they were in antiquity), and of their removes or changes. JUSTICE JONES was sworn one of the Justices of the King's Bench, and MYSELF (b), at the same time, at the Lord Keeper's house, was sworn (again) one of the Justices of the Common Pleas; and afterwards the other Judges, as they came to *London*, took their oaths and received their patents: and although there had been a proclamation made, that all the Judges might hold and execute their several offices as formerly, yet we conceived it

safest

By the common law the commissions of the judges determined by the demise of the crown, and could not be kept in force by proclamation. Post. 97, 98.

(a) Dyer, 165. a. 2. Inst. 26. 4. Inst. 25. 7. Com. Dig. 2. Hale, P. G. 24.

(b) Cro. Jac. 699. Pref. Cro Eliz. 6.

~~safest that none of us should intermeddle until we were re-~~  
authorized by our new patents, and sworn anew (a).

If a writ for the creation of a serjeant be returnable *immediat*, and the serjeant appear before the chancellor in the *vacation* and is sworn, it is illegal. Jones, 63. 1. Sid. 3.

THIS vacation SIR JOHN WALTER, Attorney to Prince Charles before he was King, and SIR THOMAS TREVOR, the said Prince's Solicitor, were appointed the King's Serjeants, and writs directed to them returnable in Chancery; who thereupon, in the vacation, appeared before the Lord Keeper at his house in *Westminster*, and there took the oath for Serjeants, and then also sworn the King's Serjeants, and their patents were delivered them.

The ceremony of creating serjeants ought to be performed in a solemn manner, and therefore their returning in their party-coloured robes from *Serjeants-Inn* to *Westminster* is not to be dispensed with. Post. 67. 375.

AFTERWARDS SIR HENRY YELVERTON received a writ to be Serjeant, returnable in Chancery the fourth day of *May* (which was the first day of the Term), with a warrant also to be one of the Justices of the Common Pleas; and thereupon he made suit to the Chief Justice, that he might have his robes and coif put upon him in the Treasury of the Common Pleas, and be dispensed with for returning in his party-coloured robes from *Serjeants-Inn* to *Westminster*, as the manner is of new serjeants.

The twelve judges shall regulate the ceremonies to be used on the call of serjeants.

UPON this occasion, all the Justices and Barons met at *Serjeants-Inn*, by appointment of the Chief Justice, where SIR HENRY YELVERTON then shewing the reasonableness of his request (because by the suddenness of his calling he was unprovided for the solemnities), cited a precedent,

(u) But now by 7. & 8. Will. 3. c. 27. s. 21. and 1. Ann. c. 8. every commission, patent, or grant of any office civil or military, shall continue in force for six months after any demise of the crown, unless it be made void by the successor in the mean time.—2. Hawk. P. C. ch. 1. s. 12.—See also 12. & 13. Will. 3. c. 2.

1 Geo. 3. c. 3. 32. Geo. 2. c. 35. 2. Geo. 3. c. 4. 5. Geo. 3. c. 47. and 19. Geo. 3. c. 65. by which the commissions of the Judges shall remain in full force during their good behaviour, notwithstanding the demise of the crown, and their salaries fixed and made payable independent of the king.



viz. that SIR EDWARD COKE, being King's Attorney, was made Serjeant and Chief Justice of the Common Pleas, and sworn in Chancery the same day, and then his robes and coif being put on in the Treasury of the Common Pleas by SIR JOHN POPHAM, Chief Justice, and by SIR THOMAS FLEMING, Chief Baron, he was led in his party robes to the Common Pleas bar to make his count, and there took the oath of Chief Justice, all in one day: and he likewise desired, that so it might be done to him. But all the Justices conceived it was not a precedent to be followed, being part of the ceremony for the creation of Serjeants, which ought to be performed in solemn manner; nor could it be convenient to suffer any more such examples.

THEREFORE they all resolved, that the writs of the said Serjeants returnable *immediatè* to appear in the Vacation, and then swear them at the Lord Keeper's house, was not legal and according to the course of law; for although the Chancery be always open to purchase general writs, or try matters of equity, to have writs returnable *immediatè*, yet this writ, which is of so high a nature as to command *ad comparendum et recipiendum statum et gradum Servientis ad legem*, ought to be made returnable at a day certain in Term, and not in the Vacation, when a day cannot be prefixed (as of necessity ought to be) for the performance of all the ceremonies necessary for that calling.

The writ for the creation of a serjeant ought to be made returnable on a day certain in term, and not in the vacation. Post. 211.

WHEREUPON they moved the Lord Keeper to have other writs directed to them, to take the said estate and degree, returnable in Chancery *May* the 4th, being the

If the creation of a serjeant be void, he may be required *de novo* to take the same state and degree. 1. Sid. 3.

first



first of this Term; which was done accordingly, and they sworn there by agreement amongst themselves in this order:

The order of swearing in serjeants may be settled by agreement.

FIRST, SIR JOHN WALTER, who had a warrant to be the King's Serjeant, and appointed to be Chief Baron (in the place of SIR LAWRENCE TANFIELD, who died the 30th of April before).

Then SIR HENRY YELVERTON, who had been the King's Attorney, and was ancient to them both.

Lastly, SIR THOMAS TREVOR, who had also a patent to be the King's Serjeant.

A serjeant whom the king intends to create a judge cannot (on notice from the chief justice) practise at the bar.

Post 375.

On Tuesday May 10, in the second week of the Term, the said SIR JOHN WALTER, being of the Inner Temple, SIR HENRY YELVERTON, of Gray's Inn, and SIR THOMAS TREVOR, of the Inner Temple, with the benchers, readers, and others of those inns of court, whereof they respectively had been, being attended by the Warden of the Fleet and Marshal of the Exchequer, made their appearance at Serjeants-Inn, in Fleet-street, before the two Chief Justices and all the Justices of both benches. And SIR RANDOLPH CREW, Chief Justice, made a short speech to them, and (because it was intended they should not continue Serjeants to practise) he acquainted them with the King's purpose of advancing them to seats of judicature, and exhorted them to demean themselves well in their several places. Then every one in his order made his count, and defences were made by the ancient Serjeants; and

and their several writs being read, their *coifs* and *scarlet hoods* were put on them, and being arrayed in their brown-blue gowns went to their chambers, and all the Judges to their several places at *Westminster*; and afterward the said three Serjeants, attired in their *party-coloured robes*, attended with the Marshal and Warden of the Fleet, the servants of the said Serjeants going before them, and accompanied with the benchers and others of the several inns of court of whose society they had been, walked to *Westminster*, and there placed themselves in the Hall over against the Common Pleas bar.

The Hall being full, a lane was made for them to the bar; then (the Justices of the Common Pleas being only in court) they recited their several *counts*, and several *defences* made to several *counts*, and had their writs read, the first and third by BROWNLOWE, the chief prothonotary, and the second by GOULSTON, the second prothonotary.

Prof. 10. Rep 99.  
Cro. Jac. p. 2.

SIR JOHN WALTER and SIR THOMAS TREVOR gave rings to the Judges with this inscription, "*Regi Legi servire Libertas.*"

SIR HENRY YELVERTON gave rings whereof the inscription was, "*STAT LEGE CORONA.*"

Presently after (they all standing together) returned to Serjeants-Inn, where was a great feast, at which SIR JAMES LEE, Lord Treasurer, and the Earl of *Manchester*, Lord President of the Council, were present.

Upon

# INTRODUCTION.

Upon ~~Thursday~~ the 22<sup>th</sup> day of May, Sir HENRY  
YELVERTON was made Justice of the Common Pleas  
(being the fifth Justice); and the same day Sir JOHN  
WALTER was sworn Chief Baron, and Sir THOMAS  
TREVOR one of the Barons of the Exchequer.

Pref. 4. Rep. 30.  
Post. 125.

Sir Edward Bromley, Knt.  
Sir John Denham, Knt.  
Sir Thomas Trevor, Knt.

SIR EDWARD BROMLEY died in the thirteenth year of the reign of Henry the eighth, and was succeeded by Sir John Denham, who was made one of the barons of the exchequer.

In the thirteenth year of the reign of Henry the eighth, Sir John Denham was made one of the barons of the exchequer, and Sir Thomas Trevor was made one of the barons of the exchequer.

In the thirteenth year of the reign of Henry the eighth, Sir John Denham was made one of the barons of the exchequer, and Sir Thomas Trevor was made one of the barons of the exchequer.

In the thirteenth year of the reign of Henry the eighth, Sir John Denham was made one of the barons of the exchequer, and Sir Thomas Trevor was made one of the barons of the exchequer.

In the thirteenth year of the reign of Henry the eighth, Sir John Denham was made one of the barons of the exchequer, and Sir Thomas Trevor was made one of the barons of the exchequer.

**WHEN**  
In the thirteenth year of the reign of Henry the eighth, Sir John Denham was made one of the barons of the exchequer, and Sir Thomas Trevor was made one of the barons of the exchequer.

Richard Weston removed in the thirteenth year of the reign of Henry the eighth, and Sir John Denham was made one of the barons of the exchequer.



# KEEPERS OF THE GREAT SEAL

Upon the 27th day of October following, the said bishop was discharged Post, 13. of that place. And upon the 30th of the same month, Sir Thomas Coven-  
try, Knight, the king's attorney, was made keeper of the great seal.

Upon the 10th day of January, 16, Car. 1. Sir Edward Littleton, chief Just. 37  
of the common pleas, was made and sworn keeper of the great seal,  
the place of Sir John Finch.

## JUSTICES

# JUSTICES OF THE KING'S BENCH.

## I. Car. I.

*Sir Randolph Crew, Knt. Chief Justice.*

*Sir John Doderidge, Knt.*

*Sir William Jones, Knt.*

*Sir James Whitlock, Knt.*

} *Justices.*

Post. 51. 65. IN Michaelmas Term, 2. Car. 1. *Sir Randolph Crew* was amoved from his place : and in Hilary Term following, *Sir Nicholas Hyde, Knight*, was made chief justice.

Post. 127. Upon the 11th of September, 4. Car. 1. *Sir John Doderidge* died : and upon the 9th of October following, *Sir George Croke* was removed from the common pleas, and made one of the justices of the king's bench.

Post. 225. In the summer vacation, viz. 25th August, 7. Car. 1. *Sir Nicholas Hyde* died : and in Michaelmas Term following, viz. 24th October, *Sir Thomas Richardson*, chief justice of the common pleas, was sworn chief justice.

Post. 268. *Sir James Whitlock* died in the summer vacation, 8. Car. 1. : and in Michaelmas Term following, *Sir Robert Berkley, Knight*, and the king's serjeant, was sworn one of the justices of king's bench.

Post. 395. In the Michaelmas vacation, 10. Car. 1. *Sir Thomas Richardson* died : and,

Post. 403. In Easter Term, 11. Car. 1. *Sir John Brampton, Knight*, was made chief justice.

Post. 600. Upon the 9th of December, 16. Car. 1. *Sir William Jones* died : and in Hilary Term following, *Sir Robert Heath* was sworn one of the justices of that court.

## JUSTICES OF THE COMMON PLEAS.

## 1. Car. 1.

*Sir Henry Hobart, Knt. and Bart. Chief Justice.*

*Sir Richard Hutton, Knt.*

*Sir Francis Harvey, Knt.*

*Sir George Croke, Knt.*

*Sir Henry Yelverton, Knt.*

} Justices.

In Michaelmas vacation, 1. Car. 1. *Sir Henry Hobart* died: and, Post. 28.

Upon the last day of Michaelmas Term, 2. Car. 1. *Sir Thomas Richardson, Knight*, and serjeant at law, was made chief justice of the common pleas. Post. 56.

In Michaelmas Term, 4. Car. 1. *SIR GEORGE CROKE, Knight*, advanced to be justice of the king's bench, *ut supra*. Post. 127.

In Hilary Term, 5. Car. 1. *Sir Henry Yelverton* died: and *Obasis Purificationis* following, *Sir Humphry Davenport, Knight*, was made one of the justices of the common pleas.

In Easter Term, 7. Car. 1. *Sir Humphry Davenport* was made chief Post. 211.  
baron of the exchequer: and in *Quindena* of the same Term, *Sir George Vernon* was removed from being one of the barons of the exchequer, to be one of the justices of the common pleas.

In Michaelmas Term, in the same year, *Sir Thomas Richardson* advanced to be chief justice, *ut supra*: and the same Term, *viz.* 27th October, *Sir Robert Heath, Knight*, was made chief justice of the common pleas. Post. 225.

*Sir Francis Harvey* died in the summer vacation, 8. Car. 1.: and in Post. 268.  
the Michaelmas Term following, *Francis Crawley*, the queen's serjeant at law, was made one of the justices, &c.

In the summer vacation, *viz.* 14th September, 10. Car. 1. *Sir Robert Heath* was discharged of his place: and in *Tres Michaelis* following *Sir J. Finch, Knight*, of the king's learned counsel, and attorney to the queen, was made chief justice to that court. Post. 375.

In



Post. 537.

In Hilary vacation, 14. Car. 1. *Sir Richard Hutton* departed this life.

In Easter Term, 15. Car. 1. *Edmund Reye*, serjeant at law, was sworn one of the justices of the common pleas.

Post. 8. 561.  
565.

*Sir George Vernon* died in the Michaelmas vacation, in the same year: and in the Hilary Term following, *Robert Foster*, serjeant at law, was sworn justice of the common pleas.

Post. 565. 567.

In the same year and Term, *Sir John Finch* was made keeper of the great seal, *ut supra*: and *Sir Edward Littleton, Knight*, solicitor general, was then made chief justice of the common pleas.

Post 600.

In Hilary Term, 16. Car. 1. *Sir Edward Littleton*, was made keeper, *ut supra*: and in the same Term, *Sir John Banks, Knight*, attorney general, was made chief justice of the common pleas.

BARONS

# BARONS OF THE EXCHEQUER.

1. Car. 1.

*Sir John Walter, Chief Justice.*

*Sir Edward Bromley, Knt.*

*Sir John Denham, Knt.*

*Sir Thomas Trevor, Knt.*

} *Justices.*

SIR EDWARD BROMLEY died in the summer vacation, 3. Car. 1. and Michaelmas Term following, *Sir George Vernon, Knight*, was made one of the barons of the exchequer. Post. 85.

In Michaelmas Term, 5. Car. 1. *Sir John Walter* was commanded to Post. 203. to bear the exercising of his place; yet held the same by his patent until his death, being upon the 18th of November, anno 6. Car. 1. F. 203.

In Easter Term, 7. Car. 1. *Sir Humphry Davenport*, one of the justices of Post. 211. the common pleas, was made chief baron, *ut supra*.

In the same year and Term, *Sir James Weston, Knight*, was made one of Post. 211. the barons of the exchequer in the place of *Sir George Vernon*, who was advanced to the common pleas, *ut supra*.

In Hilary Term, 9. Car. 1. *Sir James Weston* departed this life. Post. 339.

In Easter Term, 10. Car. 1. *Richard Weston*, serjeant at law, was made Ibid. one of the barons of the exchequer.

*Richard Weston* removed, 14. Car. 1.: and in Hilary Term, in the same year, *Edward Henden*, serjeant at law, was made one of the barons of the exchequer.

*Mantissa.*

*Mantissa.*

**P**AGE 182. *The King against Sir John Elliot, Denzill Hollis, and Benjamin Valentine.* *Nota,* That afterwards, in the Parliament 17. Car. 1. it was resolved by the House of Commons, That they should have recompence for their damages, losses, imprisonments, and sufferings sustained for their services to the Commonwealth in the Parliament 3. Caroli. *Vide post. fol. 604, 605. &c.*

See I. Com.  
Dig title "AD-  
"MIRALTY,"  
(E. 15.) page  
273.

Page 296. *Resolution upon the Cases of Admiral Jurisdiction.* *Nota,* These were not any judicial resolutions, and therefore not authentic. *Vide* an ordinance 12 Aprilis, 1647, touching the same.

Page 524. *The Lord Saye's Case.* *Nota,* The resolution in *Mr. Hampden's Case* there cited, was adjudged to be against law, and repealed by the statute of 17. Car. *Vide post. page 601.*



---

R E P O R T S  
OF  
SIR GEORGE CROKE, KNIGHT,  
OF  
S E L E C T C A S E S  
ADJUDGED IN THE  
COURTS of KING's-BENCH and COMMON-PLEAS,  
IN THE REIGN OF  
C H A R L E S T H E F I R S T.

---



# I N D E X

OF

## N A M E S O F C A S E S .

### A

|                                                                                                                                           | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------|------|
| <b>A</b> BDY Cafe, -                                                                                                                      | 585  |
| Acton v. Symon, -                                                                                                                         | 414  |
| Adams v. Hिल्s, -                                                                                                                         | 164  |
| Adams v. Lord Warden of the Stannaries, -                                                                                                 | 333  |
| Anonymi, 96. 139. 145. 201. 202. 229. 233. 264. 280. 297. 316. 336. 337. 339. 380. 403. 413. 464. 472. 499. 509. 561. 571. 579. 580. 596. |      |
| Ansley v. Chapman, -                                                                                                                      | 157  |
| Angel v. Cooper, -                                                                                                                        | 517  |
| Appleton v. Stoughton, -                                                                                                                  | 516  |
| Arundel v. Saunders, -                                                                                                                    | 502  |
| Arundel v. Mare, -                                                                                                                        | 552  |
| Arscot v. Heale, -                                                                                                                        | 6    |
| Aspye v. Pembridge, -                                                                                                                     | 597  |
| Ascouch's Cafe, -                                                                                                                         | 525  |
| Atkey v. Heard, -                                                                                                                         | 219  |
| Audley v. Halfey, -                                                                                                                       | 148  |
| Aylesworth v. Chadwell, -                                                                                                                 | 38   |

### B

|                      |          |
|----------------------|----------|
| Babington v. Wood, - | 180      |
| Bachelor v. Gage, -  | 188      |
| Bacon v. Bacon, -    | 601      |
| Bagnal v. Knight, -  | 553      |
| Baker v. Hacking, -  | 387. 405 |

CRO. CAR.

### B

|                           | Page     |
|---------------------------|----------|
| Baker v. Breerman, -      | 418      |
| Baker v. Willis, -        | 476      |
| Baldry v. Packard, -      | 46       |
| Ball v. Baggerley, -      | 326      |
| Ball v. Trelawny, -       | 603      |
| Bannister's Cafe, -       | 38       |
| Barnaby v. Rigalt, -      | 301      |
| Barkham's Cafe, -         | 507      |
| Bardsey v. Clyfton, -     | 541      |
| Barfoot v. Norton, -      | 559      |
| Bathel's Cafe, -          | 570      |
| Baynes v. Brighton, -     | 515      |
| Bayly v. Offord, -        | 137      |
| Bauderock v. Mackaller, - | 330      |
| Beale v. Beale, -         | 353      |
| Beamond v. Long, -        | 208. 227 |
| Beare v. Woodley, -       | 154      |
| Bell's Cafe, -            | 449      |
| Benson v. Flower, -       | 166      |
| Bennet's Cafe, -          | 104      |
| Bennet v. Easden, -       | 55       |
| Bensted's Cafe, -         | 583      |
| Bethyll v. Parry, -       | 189      |
| Berry v. Heard, -         | 242      |
| Bigot v. Smith, -         | 102      |
| Birt v. Manning, -        | 425      |
| Bland v. Inman, -         | 288      |
| Blage v. Gold, -          | 447. 473 |
| Blunden v. Baugh, -       | 302      |
| Blyzard v. Barns, -       | 307      |
| Bodvell v. Bodvell, -     | 170      |
| Bord v. Cudmore, -        | 183      |
| b                         | Boulton  |



# INDEX OF NAMES

|                           | Page     |                                | Page     |
|---------------------------|----------|--------------------------------|----------|
| Boulton v. Banks          | 254      | Coke, Sheriff, &c.             | 25       |
| Boreton v. Nicholls,      | 363. 401 | Coke v. Younger,               | 16       |
| Bower v. Cooper,          | 486      | Coke v. Dowze,                 | 241      |
| Bradstock v. Scovell,     | 434      | Coke v. Coke,                  | 531      |
| Brett v. Read,            | 343      | Cook's Cafe,                   | 537      |
| Brice's Cafe,             | 593      | Collis v. Malon,               | 282      |
| Brikenden's Cafe,         | 9        | Congham v. King,               | 221      |
| Brian v. Cockman,         | 322      | Copland v. Pyott,              | 244      |
| Bryan v. Wikes,           | 572      | Cooper's Cafe,                 | 544      |
| Bryan v. Wetherhead,      | 17       | Corbet v. Bans,                | 443      |
| Brown v. Taylor,          | 38       | Courtney v. Greenville,        | 209      |
| Brown v. Hancock,         | 115      | Cort v. Bishop of St. David's, | 341. 348 |
| Brooks v. Goring,         | 197      | Cox's Cafe,                    | 176      |
| Broxhorn v. Dagar,        | 320      | Crane v. Crampton,             | 31       |
| Bull v. Wiatt,            | 388      | Crane v. Holland,              | 138      |
| Bumsted's Cafe,           | 438. 448 | Crayford v. Crayford,          | 106      |
| Butler v. the Physicians, | 256      | Crawley's Cafe,                | 567      |
| Burgoin v. Spurling,      | 273. 283 | Crew v. Vernon,                | 97       |
| Burgeses' Cafe,           | 365      | Cripps v. Gryfill,             | 37       |
| Bushel v. Yaller,         | 408      | Crisp v. Prat,                 | 548      |
| Burwell's Cafe,           | 597      | Crawley v. Dawson,             | 204      |
|                           |          | Arth. Crohagen's Cafe,         | 332      |
|                           |          | Crump v. Barne,                | 31       |
|                           |          | Cule v. Executors of Thorn,    | 186      |
|                           |          | Cucko v. Starre,               | 285      |
|                           |          | Cusack's Cafe,                 | 128      |

## C

|                             |          |
|-----------------------------|----------|
| Calmady's Cafe,             | 595      |
| Canway v. Aldwin,           | 573      |
| Caroon's Cafe,              | 8, 9     |
| Carlion v. Mills,           | 291      |
| Castle v. Hobbs,            | 21       |
| Cavendish v. Middleton,     | 141      |
| Cawdry v. Higheley,         | 270      |
| Ceeley v. Hopkin,           | 474. 480 |
| Ceeley v. Hoskins,          | 509      |
| Chambers' Cafe,             | 133. 168 |
| Chambers v. Bromfield,      | 601      |
| Chamberlain v. Turner,      | 129      |
| Chapman v. Chapman,         | 76       |
| Chapman v. Allen,           | 271      |
| Chapman's Cafe,             | 340      |
| Chedley's Cafe,             | 331      |
| Chicheley v. Thompson,      | 104      |
| Child v. Greenhill,         | 553      |
| Cholmley's Cafe,            | 464      |
| Clapham's Cafe,             | 97       |
| Claxton v. Lylborn,         | 522      |
| Cleve v. Veer,              | 450. 457 |
| Clothworthy v. Clothworthy, | 436      |
| Codrington v. Rodman,       | 198      |

## D

|                       |          |
|-----------------------|----------|
| Dalby v. Dorthall,    | 553      |
| Daly v. Belamie,      | 542      |
| Daniel v. Hertford,   | 542      |
| Darrosse v. Newhott,  | 143      |
| Davenport v. Penfell, | 516      |
| Davie v. Hawkins,     | 53       |
| Dawson v. Lee,        | 566      |
| Decrow v. Jenkins,    | 178      |
| Delve v. Clerk,       | 285      |
| Denn's Cafe,          | 115      |
| Dennis v. Payne,      | 551      |
| Derbie v. Hemming,    | 593      |
| Digbie v. White,      | 426      |
| Dike v. Ricks,        | 335      |
| Dodson v. Lynn,       | 475      |
| Done v. Smethier,     | 415      |
| Dow v. Golding,       | 196      |
| Down v. Hathwayte,    | 416. 418 |
| Downs                 |          |

# O F C A S E S.

|                       | Page |                    | Page           |
|-----------------------|------|--------------------|----------------|
| Downs v. Winterflood, | 202  | Flower v. Baldwin, | 217            |
| Dorchester v. Webb,   | 372  | Forger v. Sales,   | 147            |
| Drake v. Corderoy,    | 288  | Foster v. Smith,   | 31             |
| Drake v. Munday,,     | 207  | Fotherby's Case,   | 62             |
| Drake's Case,         | 220  | Freeman's Case,    | 579            |
| Drydon, &c. v. Yates, | 585  | Fryer v. Fawkenor, | 164            |
| Duncomb v. Smith.     | 164  | Fulwood's Case,    | 482. 484. 488. |
| Duncomb's Case,       | 366  |                    | 492            |
| Dunbar's Case,        | 349  | Fynch v. Lamb,     | 294            |
| Dymmuck v. Fawcett,   | 393  |                    |                |

## E

|                              |          |
|------------------------------|----------|
| Eaton v. Ayloff,             | 110      |
| Edgar v. Sorrel,             | 169      |
| Edwards v. Woodden,          | 323      |
| Edwards v. Rogers,           | 524. 543 |
| Eliot v. Skyppe,             | 338      |
| Elliot and Hollis' Case,     | 181      |
| Ellis v. Johnson,            | 261      |
| Eve v. Wright,               | 75       |
| Evans and Fynches' Case,     | 473      |
| Evans and Cottingham's Case, | 506      |
| Evelin's Case,               | 551      |
| Eyres v. Eyres,              | 51       |
| Eyres v. Taunton,            | 295. 312 |

## F

|                             |          |
|-----------------------------|----------|
| Facy v. Long,               | 237. 559 |
| Fairwether's Case,          | 348      |
| Faveley v. Easton,          | 269. 276 |
| Farrer v. English,          | 19       |
| Farrington v. Prince,       | 10       |
| Farington v. Keymer,        | 112      |
| Fawkner v. Bellingham,      | 80. 214  |
| Fenner v. Nicholson,        | 61       |
| Fenn's Case,                | 314      |
| Ferrer's Case,              | 371      |
| Fines v. Norton,            | 278      |
| Fish v. Wagstaff,           | 318      |
| Fitzherbert v. Fitzherbert, | 483. 484 |
|                             | 487      |
| Flight v. Crafsden,         | 8        |
| Flower's Case,              | 211      |
| Flower v. Elgar,            | 214      |

## G

|                      |          |
|----------------------|----------|
| Gee v. Freedland,    | 47       |
| Geery v. Reason,     | 128      |
| George v. Harvie,    | 282. 324 |
| Gennings v. Lake,    | 168      |
| Gilpin's Case,       | 161      |
| Gilbert v. Fletcher, | 171      |
| Girling's Case,      | 446      |
| Gobbet's Case,       | 339      |
| Goodyear v. Flatt,   | 471      |
| Goodyear v. Bishop,  | 265      |
| Goldsmith v. Sydnor, | 362      |
| Goodwin v. Moor,     | 161      |
| Goodwin v. West,     | 522. 540 |
| Goshawk v. Chiggell, | 154      |
| Gray v. Felder,      | 209      |
| Gray's Case,         | 608      |
| Green's Case,        | 16       |
| Green v. Guy,        | 146      |
| Green v. Lincoln,    | 318      |
| Grosse v. Gayer,     | 172      |
| Gryffyth v. Jenkins, | 178      |
| Gryffyth v. Byddle,  | 275      |
| Gryffyth v. Lewis,   | 444      |
| Gryffyth's Case,     | 399      |
| Grysyle v. Whitcock, | 283      |
| Gwyn v. Gwyn,        | 310      |
| Gybbs v. Wibourn,    | 526      |
| Gymlet v. Sands,     | 391      |

## H

|                       |     |
|-----------------------|-----|
| Hall v. Marshall,     | 497 |
| Halley's Case,        | 87  |
| Halley v. Stanton,    | 268 |
| Halloway's Case,      | 131 |
| Hallyday v. Oxenbrig, | 234 |

# INDEX OF NAMES

|                                | Page     |
|--------------------------------|----------|
| Haymond v. Dod,                | 5        |
| Harrison's Cafe,               | 503      |
| Harlow v. Wright,              | 195      |
| Harris v. Richards,            | 272      |
| Hart's Cafe,                   | 350      |
| Hawkins v. Bilhead,            | 404      |
| Hayes v. Hayes,                | 433      |
| Hastings v. Douglass,          | 343      |
| Healing v. Mayor of London,    | 574      |
| Hearn v. Allen,                | 57       |
| Helier v. Hundred de Benhurft, | 211      |
| Helier's Cafe,                 | 175      |
| Herbert v. Laughluyn,          | 492      |
| Hilton v. Bembridge,           | 440      |
| Hilton v. Pawle,               | 92       |
| Hill v. Thornton,              | 165      |
| Hitcham v. Porter,             | 286. 419 |
| Hinsley v. Wilkenson,          | 387      |
| Hix v. Holingshed,             | 261      |
| Hobart's Cafe,                 | 209      |
| Hodges v. Moyses,              | 45       |
| Hodgkinson v. Wood,            | 23       |
| Holms v. Savill,               | 116      |
| Holm v. Lucas,                 | 6        |
| Holm's Cafe,                   | 376      |
| Holt v. Sambach,               | 103      |
| Holingshed's Cafe,             | 229      |
| Hopetill v. Searle,            | 386      |
| Howard's Cafe,                 | 59       |
| Howell v. Thomas,              | 91       |
| Hopkin's Cafe,                 | 165      |
| Houell v. Barns,               | 382      |
| Horn v. Barber,                | 421      |
| Hughs v. Farrer,               | 141      |
| Hughs v. Bennet,               | 495      |
| Hugh's Cafe,                   | 196      |
| Hughs v. Harris,               | 229      |
| Holm v. Heylocky,              | 200      |
| Humphry v. Knight,             | 455      |
| Humphry v. Stanfeild,          | 469      |
| Hyt v. Hoxton,                 | 153      |
| Hynd v. Bishop of Chichester,  | 237      |

# I

|                   |   |      |     |
|-------------------|---|------|-----|
| James v. Heyward, | - | -    | 184 |
| James v. Tutney,  | - | 497- | 532 |
| Jaxton v. Tanner, | - | -    | 236 |
| Jette's Caf.,     | - | -    | 175 |

|                                  |      |      |
|----------------------------------|------|------|
|                                  |      | Page |
| Jeffrys v. Payne,                | -    | 510  |
| Jenkins v. Young,                | -    | 230  |
| Jennings v. Vandeput,            | -    | 263  |
| Jerom's Cafe,                    | -    | 74   |
| Jeffon v. Laxon,                 | -    | 254  |
| Inkerfols v. Samms,              | -    | 130  |
| Johns v. Rowe,                   | -    | 106  |
| Johns and Robinson v. Dodsworth, |      | 192  |
| Johns v. Stayner,                | 272. | 281  |
| Johns v. Stratford,              | -    | 309  |
| Johnson v. Rowe,                 | -    | 265  |
| Johnson v. Davie,                | -    | 327  |
| Ireland v. Blockwell,            | -    | 570  |
| Isham v. York,                   | -    | 14   |
| Isham v. Morrice,                | -    | 109  |
| Juxon v. Thornhill,              | -    | 132  |

K

|                           |   |          |
|---------------------------|---|----------|
| Kadwallader v. Brian,     | - | 162      |
| Keeley v. Manning,        | - | 180      |
| Kerchevall v. Smith,      | - | 285      |
| Kendall v. Fox,           | - | 145      |
| Kenion v. Davies,         | - | 487      |
| Kelland v. White,         | - | 494      |
| Kent v. Steward,          | - | 358      |
| Kemp v. Barnard,          | - | 513      |
| Kiffyn v. Vaughan,        | - | 262      |
| Kirton's Cafe,            | - | 87       |
| The King v. Maynard,      | - | 231      |
| — v. Rodman,              | - | 198      |
| — v. Sir James Wingfield, | - | 251      |
| — v. Elliot,              | - | 181      |
| — v. Hobart,              | - | 209      |
| — v. Hill,                | - | 232      |
| — v. Mayor of London,     | - | 252      |
| — v. Ward,                | - | 266      |
| — v. Sherington,          | - | 311      |
| — v. Bagshaw,             | - | 347, 361 |
| — v. Abp. of Canterbury,  | - | 354      |
| — v. Mynn,                | - | 409      |
| — v. Inh. of Epworth,     | - | 410      |
| — v. Rooks,               | - | 439      |
| — v. Heyward,             | - | 491      |
| — v. Freedland,           | - | 498      |
| — v. Dreyden,             | - | 499      |

## King



# O F C A S E S.

|                           | Page     |
|---------------------------|----------|
| King v. Lord, - - -       | 204      |
| King v. Edwards, - - -    | 320      |
| King v. Coke, - - -       | 384      |
| King v. Fitch, - - -      | 414, 452 |
| Kings v. Hilton, - - -    | 603      |
| Knight v. Harvey, - - -   | 25       |
| Kniveton v. Latham, - - - | 490      |
| Kynaon v. Moor, - - -     | 89       |

## L

|                              |          |
|------------------------------|----------|
| Lacon v. Barnard, - - -      | 35       |
| Lakins v. Lamb, - - -        | 235      |
| Lancelot v. Allen, - - -     | 248      |
| Langham v. Bewett, - - -     | 68, 69   |
| Lancaster v. Keyleygh - - -  | 300      |
| Langden v. Stokes, - - -     | 383      |
| Langford-bridge, - - -       | 365      |
| Levann's Cafe, - - -         | 201      |
| Lawrence v. Woodward - - -   | 277      |
| Latham v. Atwood, - - -      | 515      |
| Le Marchant v. Rawson, - - - | 274, 278 |
| Launder v. Brooks, - - -     | 561      |
| Lawson's Cafe, - - -         | 507      |
| Lawe v. Harwood, - - -       | 140      |
| Lewknor v. Cruchley, - - -   | 140      |
| Leycroft v. Dunker, - - -    | 317      |
| Richard Lee's Cafe, - - -    | 592      |
| Lee v. Boothbye, - - -       | 521      |
| Lee v. Ruffel, - - -         | 560      |
| Levett's Cafe, - - -         | 538      |
| Leyton's Cafe, - - -         | 584      |
| Lincoln's Cafe, - - -        | 64       |
| Lister v. Holmes, - - -      | 544      |
| Lister v. Bromley, - - -     | 286      |
| Love v. Platers, - - -       | 40       |
| Long v. Nethercote, - - -    | 143      |
| Lodge v. Hollowell, - - -    | 587      |
| London v. Alford, - - -      | 575      |
| Lloyd v. Gregory, - - -      | 502      |
| Lutterell v. Lea, - - -      | 297      |
| Lynnet v. Wood, - - -        | 157      |

## M

|                           |     |
|---------------------------|-----|
| Marshall's Cafe, - - -    | 9   |
| March v. Culpepper, - - - | 70  |
| Mariot v. Kinsman, - - -  | 219 |

|                                       | Page     |
|---------------------------------------|----------|
| Matham v. Bridges, - - -              | 223      |
| Matthews v. Whetton, - - -            | 233      |
| Major v. Talbott, - - -               | 285      |
| Major v. Brandwood, - - -             | 250      |
| Manning v. Fitzherbert, - - -         | 271      |
| MacKaller v. Toderick, 337, 353, 361  |          |
| Mayo v. Cogshall, - - -               | 406      |
| Mann v. Bishop of Bristol and Hide,   | 505      |
| Martyn v. Nicholls, - - -             | 573      |
| Mead v. Perkins, - - -                | 261      |
| Mead v. Thurman, - - -                | 393      |
| Mead v. Sir John Lenthall, - - -      | 587      |
| Meredith v. Jones, - - -              | 244      |
| Merrick v. Hundred de Rapegate, - - - | 379      |
| Mildmay's Cafe, - - -                 | 59       |
| Mills v. Mills, - - -                 | 239, 241 |
| Miller v. Manwaring, - - -            | 397      |
| Middlemore v. Goodale, - - -          | 503, 505 |
| Mints' Cafe, - - -                    | 596      |
| Morrice v. Prince, - - -              | 520      |
| Morrice v. Fletcher, - - -            | 53       |
| Morley v. Bp. of Chichester, - - -    | 67       |
| Morley v. Pragnell, - - -             | 510      |
| Moor v. Hodges, - - -                 | 90       |
| Morant v. Cummin, - - -               | 94       |
| Morgan v. Green, - - -                | 187      |
| Morgan's Cafe, - - -                  | 383      |
| Mott v. Butler, - - -                 | 236      |
| Mounson v. Cleyton, - - -             | 255      |
| Mounson v. Bourn, - - -               | 519, 526 |
| Moulin v. Dallison, - - -             | 484      |
| Moyser v. Gray, - - -                 | 446      |
| Mulcarry v. Eyres, - - -              | 511      |
| Mynn v. Coughton, - - -               | 109      |
| Mynn v. Hynton, - - -                 | 329      |

## N

|                           |          |
|---------------------------|----------|
| Nash v. Preston, - - -    | 190      |
| Needler v. Symnel, - - -  | 417      |
| Netter v. Brett, - - -    | 391, 395 |
| Nevil v. South, - - -     | 286      |
| Nevison v. Whitley, - - - | 501      |
| Newport v. Mildmay, - - - | 307      |
| Nichols v. Walker, - - -  | 394      |
| North v. Wingate, - - -   | 559      |
| Norton v. Acklane, - - -  | 580      |
| Norton v. Fermer, - - -   | 113      |

# INDEX OF NAMES

|                         | Page     |                              | Page     |
|-------------------------|----------|------------------------------|----------|
| <b>O</b>                |          | <b>R</b>                     |          |
| Orm v. Pemberton,       | 589      | Randall v. Scory,            | 313      |
| Owen v. Thomas ap Rees, | 94       | Reymund v. Hundred de Oking, | 37       |
| Owen v. Long,           | 572      | Reymund v. Burbage,          | 580      |
| Oxford v. Rives,        | 79, 93   | Reynell v. Champernoon,      | 228      |
| Oxford v. Waterhouse,   | 574      | Reve v. Malster,             | 410      |
|                         |          | Reve v. Digby,               | 495      |
|                         |          | Reignald's Case,             | 63       |
|                         |          | Rhemes v. Humphreys,         | 254      |
|                         |          | Roe v. Devys,                | 563      |
|                         |          | Rowden v. Malster,           | 42       |
|                         |          | Rolt v. Sharp,               | 77       |
|                         |          | Roysen's Case,               | 146      |
|                         |          | Rockey v. Huggens,           | 220      |
|                         |          | Robenson v. Cleyton,         | 240      |
|                         |          | Rose v. Bertlett,            | 292      |
|                         |          | Roboldham v. Vanlech,        | 378      |
| <b>P</b>                |          | <b>S</b>                     |          |
| Page's Case,            | 332      | Savern v. Smith,             | 7        |
| Palmer v. Knight,       | 385      | Sands v. Trefuses,           | 575      |
| Parker v. Grigson,      | 282      | Sands v. Trevllian,          | 107, 193 |
| Parker v. Taylor,       | 316      | Say and Seal v. Stephens,    | 135      |
| Parker v. Blecke,       | 568      | Say's Case,                  | 524      |
| Parker's Case,          | 583      | Salvin v. Clerk,             | 156      |
| Peacock v. Steer,       | 29       | Salmon v. Percivall,         | 196      |
| Peele's Case,           | 113      | Savill's Case,               | 205      |
| Peto v. Pemberton,      | 101      | Sankill v. Stocker,          | 224      |
| Pembrook v. Bostock,    | 173      | Sanders v. Cornish,          | 230      |
| Powe's Case,            | 182      | Sacheverill v. Porter,       | 482      |
| Powe v. Jefferys,       | 456      | Salter v. Brown,             | 436      |
| Panfon v. Gooday,       | 327, 329 | Salisbury v. Hunt,           | 581      |
| Peck v. Ambler,         | 349      | Scavage v. Hawkins,          | 571      |
| Peard v. Johns,         | 382      | Seagood v. Hone,             | 366      |
| Perry v. Diggs,         | 494      | Seaman v. Bigg,              | 480      |
| Perkinson v. Gilliford, | 539      | Seel's Case,                 | 557      |
| Pelham v. Hemming,      | 594      | Shalmer v. Foster,           | 177      |
| Phelps v. Lane,         | 92       | Shepherd's Case,             | 190      |
| Pilchard v. Kingston,   | 202      | Sharp's Case,                | 352      |
| Pigot v. Pigot,         | 531      | Sherman v. Lyllly,           | 597      |
| Platt v. Plummer,       | 24       | Sidley v. Mondford,          | 63       |
| Player v. Warn,         | 54       | Simms v. Smith,              | 176, 299 |
| Plowden v. Oldford,     | 582      | Skevill v. Avery,            | 138      |
| Powell v. Plunket,      | 52       | Slater's Case,               | 470      |
| Powell v. Sheen,        | 531      | Slocomb's Case,              | 442      |
| Poynter v. Poynter,     | 194      | Sloper v. Child,             | 595      |
| Porter v. Hutchman,     | 315      | Smart v. Easdale,            | 199      |
| Porter's Case,          | 461      |                              |          |
| Priest v. Wood,         | 301      |                              |          |
| Prigion's Case,         | 341, 350 |                              |          |
| Price v. Parkhurst,     | 420      |                              |          |
| Prinfor's Case,         | 602      |                              |          |
| Proctor v. Chamberlain, | 564      |                              |          |
| Prose's Case,           | 389      |                              |          |
| Pruett v. Drake,        | 300      |                              |          |
| Purchase v. Jeggon,     | 78       |                              |          |
| Pyne's Case,            | 117      |                              |          |

O F C A S E S.

|                            | Page          |                              | Page     |
|----------------------------|---------------|------------------------------|----------|
| Smith v. Crashaw,          | 15            | Taylor v. Page,              | 116      |
| Smith v. Trynder,          | 22            | Taylor v. Starkey,           | 192      |
| Smith v. Wade,             | 32            | Taylor v. Willis,            | 219      |
| Smith v. Richardson,       | 33            | Talory v. Jackson,           | 513      |
| Smith v. Ashe,             | 58            | Tankersley v. Robinson,      | 162      |
| Smith v. Ex. of Poyndrell, | 97            | Taverner v. Skingle,         | 226      |
| Smith v. Norfolk,          | 225           | Terrey's Case,               | 564      |
| Smith v. Hodgeskins,       | 276           | Thorowgood v. Collins,       | 75       |
| Smith's Cafe,              | 465           | Thorsby v. Warren,           | 159      |
| Smith v. Smith,            | 410, 421, 425 | Thornton v. Lyfter,          | 514      |
| Smith v. James,            | 574           | Thorn v. Shering,            | 386      |
| Smith v. Smith,            | 507           | Topfall v. Edwards,          | 163      |
| Smith v. Cooker,           | 512           | Townley v. Chaloner,         | 312      |
| Smith v. Rosley,           | 529           | Townsend v. Hunt,            | 408      |
| Snape v. Norgate,          | 167           | Tolson v. Clerk,             | 438      |
| Snape v. Turton,           | 472           | Tomlings v. Brett,           | 517      |
| Snowd's Cafe,              | 321           | Torle's Cofe,                | 582      |
| Southley v. Price,         | 247           | Tredymmock v. Perryman,      | 259      |
| Southold v. Daunston,      | 269           | Tregmiell v. Reeve,          | 437      |
| South v. Griffyth,         | 481           | Tregose v. Wennell,          | 594      |
| Spalding v. Spalding,      | 185           | Turner v. Lee,               | 471      |
| Sparrow v. Matterlock,     | 319           | Turner v. Palmer,            | 74       |
| Spirit v. Bence,           | 368           | Tutter v. Hundred de Dacorn, | 41       |
| Spencer v. Medbourn,       | 420           | Tufton and Ashley's Cafe,    | 144      |
| Spooner v. Day,            | 432           | Tyler v. Wall,               | 228      |
| Sprig v. Rawlinson,        | 554           | Tyndail's Cafe,              | 252      |
| Stanford v. Cooper,        | 102           | Tylden's Cafe,               | 264, 291 |
| Star v. Buckhold,          | 309           | Tyfyn v. Wingfield,          | 325      |
| Stephens v. Potter,        | 99            | Tyffin's Cafe,               | 426      |
| Stephens v. Facone,        | 379           |                              |          |
| Stephens' Cafe,            | 566           |                              |          |
| Stephenfon's Cafe,         | 389           |                              |          |
| Stile v. Fynch,            | 381           |                              |          |
| Stirlie v. Hill,           | 283           |                              |          |
| Stringer's Cafe,           | 599           |                              |          |
| Stroud v. Hoskins,         | 208           |                              |          |
| Stone v. Linger,           | 467           |                              |          |
| Stone v. Newman,           | 427, 460      |                              |          |
| Stockman v. Hampton,       | 441           |                              |          |
| Stonehouse v. Corbet,      | 381, 400      |                              |          |
| Sutton's Cafe,             | 63            |                              |          |
| Swayn v. Rogers,           | 32            |                              |          |
| Swayn v. Stephens,         | 245, 333      |                              |          |
| Swyft v. Eyres,            | 546           |                              |          |
| Symonds v. Mewdefworth,    | 193           |                              |          |
| Symonds v. Green,          | 408           |                              |          |
| Symonds v. Seabourn,       | 325           |                              |          |
| Sydenham v. Parr,          | 486           |                              |          |
| Sybthorp's Cafe,           | 417           |                              |          |
| Sydoun v. Holm,            | 422           |                              |          |



## INDEX OF NAMES OF CASES.

|                                 | Page |                              | Page |
|---------------------------------|------|------------------------------|------|
| Watts v. Baker, - -             | 264  | Wickham v. Enfield, - -      | 351  |
| Waller v. Sands, - -            | 274  | Wilkinson v. Merryland, 447, | 449  |
| Waller's Cafe, - -              | 373  | Winchester's Cafe, - -       | 504  |
| Watkinson v. Turner, - -        | 594  | William's Cafe, - -          | 595  |
| Westley v. Allen, - -           | 94   | Woolf v. Hole, - -           | 91   |
| West v. Treude, - -             | 187  | Woolner v. Hold, - -         | 489  |
| Weeks' Cafe, - -                | 203  | Woolnough's Cafe, - -        | 552  |
| Wells v. Some, - -              | 240  |                              |      |
| Webb v. Nicholls, - -           | 459  |                              |      |
| Whyte v. Ryden, - -             | 20   |                              |      |
| Whyte v. Hanby, - -             | 525  |                              |      |
| Whytacres v. Hamkinson, - -     | 73   |                              |      |
| Whitmore v. Porter, - -         | 88   |                              |      |
| Windfor v. Hun. de Farnham, - - | 40   |                              |      |
| Wilcocks v. Bradell, - -        | 73   |                              |      |
| Withipole's Cafe, - - 134,      | 147  |                              |      |
| Wicks v. Shepherd, - -          | 155  |                              |      |
| Wilson v. Chambers, - -         | 262  |                              |      |

# THE

## Easter Term,

MIDDLESEX

I. Car. I. In the Common Pleas. LAW

Sir Henry Hobart, *Knt.* Chief Justice. LIBRARY.Sir Richard Hutton, *Knt.*Sir Francis Harvey, *Knt.*Sir George Croke, *Knt.*Sir Henry Yelverton, *Knt.*

} Justices.

Sir Thomas Coventry, *Knt.* Attorney General.Sir Robert Heath, *Knt.* Solicitor General.

## Hamond against Dod.

CASE I.

**D**EBT upon an obligation conditional, reciting, "WHEREAS On a covenant such copyhold lands were to be surrendered by *A. S.* at her full age to the use of the said *Hamond* and *Gay*, and their heirs, and that *Gay* should pay to *Hamond* thirty three pounds at such a day, and if he failed, it should be to the use of *Hamond* and his heirs; IT WAS CONDITIONED, that if the said obligor procure the said *A. S.* at her full age to surrender to the use of *Hamond* and his heirs, and if *Hamond* and his heirs might have and enjoy the said lands to him and his heirs, that then, &c."

The defendant pleaded, that *Gay* did not pay the thirty-three pounds; and that the said *A. S.* came of full age such a day, and afterwards at such a court, in full court, did surrender, release, and quit claim to the now plaintiff, being in possession, all her right, estate, and interest in the said tenements, &c. and that the plaintiff always after might have enjoyed the said tenements, &c.

The plaintiff replies, *quod bene et verum est* that the said *A. S.* did surrender, &c. *prout*; but that afterward, *viz.* on such a day the said *Gay* entered and expelled him, &c. Whereupon the defendant demurs.

And now this Term it was moved by *ATHOE, Serjeant*, that this replication was good, without shewing that the expulsion was for title, because by the obligation he hath taken upon himself to defend against all titles. *Vide 2. Edw. 4. fol. 15.* If a replication be not good, yet if the bar be ill in substance, judgment shall be for the plaintiff. *3. Co. 52. Ridgway's Case.*

But IT WAS RESOLVED, that this replication is not good, because he hath not shewn that he was evicted by lawful title; for otherwise the bond doth not extend to it. *Vide Dyer, 328. and 26. Hen. 8. f. 3.*

1. Term. Rep. B. R. 672. 3. Term Rep. 587.

(a) By 8. & 9. Will. 3. c. 11. f. 8. "may assign as many breaches as he shall think fit." *Vide Comyn's Rep. 376.*  
In all actions upon bond, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing, the plaintiff

CRO. CAR.

B

IT

Stating a surrender in court, "and released in court," is good and certain enough, according to common intendment. And although it be not said that she surrendered "to the use of the plaintiff," yet being alledged to be surrendered and released in court, and accepted by the plaintiff, and confessed in the replication, it was a surrender to the use, &c. and good enough, &c.

Post. 63. 195.  
Co. Lit. 303. a.  
5. Co. 121. a.  
8. Co. 133. b.

IT WAS ALSO HELD, that the bar, viz. "that she surrendered and released in court," is good and certain enough, according to common intendment. And although it be not said that she surrendered "to the use of the plaintiff," yet being alledged to be surrendered and released in court, and accepted by the plaintiff, and confessed in the replication, it was a surrender to the use, &c. and good enough, &c.

Plowd. 102. 5. Com. Dig. 72. Cowp. 682. Dougl. 158.

## CASE 2.

## Holme against Lucas.

A declaration in *assumpsit* must shew the certain cause of the promise.

Vide post. 31. 415.

Hob. 5. 284.  
10. Co. 77. a.  
Cro. Jac. 207.  
213. 548. 642.  
Cro. Eliz. 240.  
1. Sid. 182.  
Noy, 146.  
1. Bull. 153.  
1. Show. 347.  
1. Com. Dig. 152.  
4. Bac. Abr. 14.

**A**SSUMPSIT. The declaration and writ were, "*quòd cum indebitatus fuit*" to the plaintiff in fifteen pounds; in consideration whereof he assumed to pay unto the plaintiff the said fifteen pounds, &c.

The defendant pleaded *non assumpsit*; and found for the plaintiff.

It was now moved in arrest of judgment, that this declaration is not good, because it is generally *indebitatus assumpsit*, and doth not shew for what cause, viz. for merchandize sold, or money lent, or for other causes which lie in contract: for if it were *indebitatus* by judgment, or by specialty, which lies not in contract, an *assumpsit* in consideration thereof would not lie; because damages recovered in an *assumpsit* cannot be a bar to a debt upon a record or specialty.

HENDEN, *Serjeant, for the plaintiff*, agreed, that such a declaration had not been good if the defendant had demurred to it; but having now pleaded *non assumpsit*, and the jury having found *quòd assumpsit*, it shall be intended, that he assumed for such a debt which lieth in *assumpsit*; and therefore the defendant hath made his declaration good. And as to this point, divers precedents have been in this court, that after verdict it hath been held good; and the plaintiff had judgment: and many precedents were alledged to have been the other way, in the king's bench and exchequer-chamber.

It was appointed, that precedents on both sides should be searched; and in the mean time, *Curia advisare vult* (a).

(a) Resolved, that the omission is not post. 31. and see *Avery v Hoole*, Cowp. aided by the verdict. Foster v. Smith. 826. Dougl. 4. 727.

## CASE 3.

## Arscott against Heale.

## In the Exchequer Chamber.

In DEBT against three obligors, one pleads *seabit ad diem*. Replication, that neither the three nor any one of them had paid. On issue joined, verdict that the one had not paid is good.

Post 25. 54. 78.  
Co. Lit. 227. a.

**E**RROR of a judgment in the king's bench, in DEBT upon an obligation of two hundred pounds, conditioned for the payment of one hundred pounds by *John Arscott*, *John Chichester*, and *John Vigniers*, or any of them, they being all jointly and severally obligors.

The defendant *John Arscott* pleads, that he paid it at the day.

The plaintiff replies, that "neither the said *John Arscott*, *John Chichester*, nor *John Vigniers*, *nec eorum aliquis*, had paid the said hundred pounds at the day, *et hoc petit, quòd inquiratur, &c. et prædictus JOHANNES ARSCOTT similiter.*"

2. Roll. Abr. 705. Hob. 49. 54. 119. Cro. Jac. 71. 5. Com. Dig. 167.



The jury found, that the aforesaid *John Arscott* had not paid the said hundred pounds, as the defendant had pleaded; and thereupon judgment was given for the plaintiff. And the error assigned was, Because the verdict was not according to the issue, for it might be paid by any of the others; which had sufficed.

But THE COURT held it to be well enough, for the addition of *John Chichester* and *John Vigniers* (not mentioned in the bar) was but surplufage; and their finding that *John Arscott* did not pay the money is sufficient: and it shall not be intended that any of the other two had paid it, when the defendant saith that he himself paid it. And if it had been proved that any of the other two had made the payment, the jury should have been directed to find that the defendant had paid it by such, &c. Whereupon judgment was affirmed.

ARSCOTT  
against  
HEALE.

### Saverne against Smith.

CASE 4.

In the Exchequer Chamber.

**E**RROR of a judgment in an ejectment. Upon a special verdict the case was, That *John Dix*, being a copyholder in fee of the manor of *Swaffling*, had issue two daughters, *Agnes* married to *John Smith*, and *Margaret* married to *William Reve*, and died seised. *William Reve* made a lease for ten years of *Margaret's* part without licence, and against the custom of the manor; which being presented by the homage as a forfeiture; the lord seised upon it, and granted it to the said *John Smith* and his heirs. Afterward *William Reve* died, leaving issue *Nicholas*, who entered, and let to the plaintiff for three years. The plaintiff entered, and was ejected by the defendant, who claims under the said *John Smith*. *Et si super totam materiam, &c.*

Qu. If judgment in ejectment de integris tenementis, where it ought to have been only for a moiety, is erroneous?

See Runnington on Eje & I 111 125.  
5. Com. Dig. 278.

The judgment was entered, "*pro eo quod videtur Curia*, that the defendant was guilty of the trespass and ejectment aforesaid, *modo et forma prædictæ*. as the plaintiff hath declared. *Ideo consideratum est*, that he shall recover his damage aforesaid, &c."

The error assigned in law was, FIRST, That judgment is given for the plaintiff, where it ought to have been given for the defendant.

SECONDLY, Because the judgment is for the ejectment *de integris tenementis*, where it ought to have been but of the moiety.

ATHOE, Serjeant, said, that for the first point he would not insist whether it were error or no; for he conceived the second to be a manifest error, because the plaintiff had no colour to have an ejectment, but for a moiety only. And the judgment was given for the whole, and entire damages assessed by the jury. Whereupon *Curia visare vult*.

For the matter in law the case is, A copyholder in fee takes a husband, who makes a lease for years, which by the custom of the manor is a forfeiture. The husband dieth: Whether this forfeiture shall bind the wife and her heirs after her husband's death? IT WAS ADJUDGED it should not bind; but that the wife shall have it again after her husband's death, notwithstanding the forfeiture.

If a husband seised of a copyhold in right of his wife make a lease not warranted by the custom; it is a forfeiture of the estate during the

of the husband only. Bendl. 147. 1. Roll. Ab. 509. 2. Roll. Rep. 344. 361. 372. 8 (o 44. Eliz. 149 391. Godb. 345. Paim. 383. Gilb. Ten. 243. 4. Co. 27. a. 2 Com. Dig. 525. Bac. Ab. 307.

## CASE 5.

## Flight against Crasden.

*Assumpsit* will lie upon a mutual promise, viz. that if the obligor will pay the money on the day, the obligee will deliver up the bond.

Hutton, 76.

Cro. Eliz. 194.

439.

1. Roll. Ab. 23.

27.

1. Vent. 258.

1. Com. Dig.

141.

1. Term Rep.

479. 483.

**A**SSUMPSIT. Whereas the plaintiff was obliged to the defendant in an obligation of sixty pounds to pay thirty the 9th day of *May* 1624; that the defendant, the said 9th of *May*, in consideration the plaintiff would pay to him the said thirty pounds upon the said 9th of *May*, promised to deliver the said bond to be cancelled: and alledgeth in fact, that he paid the said thirty pounds to the defendant according to his promise, and that the defendant had not delivered him the said bond to be cancelled, but refused, and had caused him to be arrested thereupon, to his damage, &c.

The defendant, *protestando* that he made not any such promise, *pro placito dicit, quod non solvit, &c.* whereupon they were at issue; and it was found for the plaintiff.

GWYN, *Serjeant*, moved in arrest of judgment, that this is not any consideration to charge the defendant: for he received but his money at that instant time; and consideration ought always to be matter of profit and benefit to him to whom it is done, by reason of the charge or trouble of him who doth it; otherwise it is not a sufficient ground for a promise, and so the action lies not: and for proof hereof he cited 9. *Edw.* 4. pl. 19.

But RICHARDSON, *Serjeant*, for the plaintiff, shewed, that it is consideration sufficient to have it paid without suit or trouble; for peradventure the non-payment at that time would be more prejudicial to him than the forfeiture of the bond would be of advantage, if he should be forced to sue for it. And he promised to do nothing but that which in honesty and equity he ought to do, viz. to deliver up the bond upon payment of the money; which promise is binding.

ALL THE COURT were of that opinion, for the reasons before alledged.—And HOBART said, if he had promised in this case, that if he would pay the money in the morning of the said day, he would give him five pounds, it had been a good promise, because the money was paid before sun-set (the time when the law appoints it to be paid).—And it was adjudged for the plaintiff, HARVEY and YELVERTON *absentibus* (a).

(a) *Sed vide* Cowp. 128.

## CASE 6.

## Caroon's Case.

An alien may be executor and administrator of chattels real as well as personal; and if he sue in *autre droit*, his alienage cannot be pleaded in abatement.

Co. Lit. 2. b.

note (8) 128. b.

129. b.

1. Salk. 2.

1. Brownl. 42.

1. Salk. 46.

4. Mod. 285.

9. *Edw.* 4. pl. 7.

Cro. Eliz. 681.

Moor, 431.

Skinner, 370.

Andrews, 76.

Strange, 1082.

Fort. 221.

Ld. Raym. 282.

Doughl. 641.

650. 1 Com. Dig. 235.

262. 300. 302.

1. Bac. Abr. 84.

2. Bac. Ab. 375.

3. Bac. Abr. 696.

Doughl. 641 to 650.

**S**IR UPWELL CAROON, an alien born, and not made denizen, being agent here for the *States* of the *Low Countries*, died intestate; and contestation was made to whom administration should be committed.

The judge of the prerogative offered to commit it to three of his brother's and sister's children, who were aliens born, and lived in the arch-duchess's country.

But one who was grandchild of his sister, born in *England* and inhabiting here, endeavouring to obtain it, moved, that of right it appertained to him, being a denizen, because the estate consisted in

leases for years of lands, and personal estate in debts; and that aliens may not have leases for years, although they may have personal things, and therefore prayed a prohibition.—*Sed Curia advisare vult.*

CARON'S  
CASE.

Afterwards, in *Michaelmas Term*, being again moved, it was resolved by the whole Court, that no prohibition was grantable; for an alien may be administrator, and have administration of leases as well as of personal things, because he hath them in another's right, and not to his own use; and he may be administrator, as well as a person outlawed or attainted may be an executor: and this Court hath no authority about committing administrations, &c. In the case of *Beck v. Philipps* (a), debt was brought by an administrator, and the defendant pleaded that the plaintiff was an *alien née*; but it was adjudged *quod respondeat oyster*.

(a) In Easter Term, 43. Eliz. Roll 1704.

### Doctor Brikenden's Case.

CASE 9.

**A** PROHIBITION was prayed, Because, upon prosecution in the spiritual court for tithes, sentence was against the defendant, and an appeal sued thereupon; and *Dr. Brikenden* made thereby a party as promoter of the suit, who was not any party thereto.

The first sentence was confirmed in *November* 1623, and costs were then awarded to *Dr. Brikenden*, but not taxed until *Hilary Term* 1623. Between the time of awarding the costs and of taxing the same came the pardon, which pardons all offences before *December* 1623, whereby this offence, and the costs taxed thereupon, as was pretended, although they were awarded in the spiritual court before the said pardon, were also pardoned; and because it was not there allowed, a prohibition was prayed.

But THE COURT denied it; for those costs being awarded to the party before the pardon, although they were taxed afterwards, are not taken away by that pardon.

C sts awarded by a spiritual court before a general pardon, though not taxed till afterwards, are not taken away by the pardon.  
5. Co. 51. b.  
Post. 47. 159.  
2. Roll Ab. 304.  
2. H.wk. P. C. 556.

### Marshall's Case.

CASE 8.

**E**JECTMENT. After imparlance the defendant pleaded "*ancient demesne*:" and it was thereupon demurred; for being after imparlance it came too late.—But THE COURT doubted thereof, because such land is not impleadable at the common law, and therefore it came time enough when he had not pleaded any other plea. *Sed Curia advisare vult.*

Qu If a plea to the jurisdiction, as "*ancient demesne*," is not too late after imparlance?

S. C. Yelv. 112.  
5. Co. 105. 1.  
Vent. 236. Latch. 83. Dyer, 210. 1. Com. Dig. 71. Stra. 520. 3. Bac. Ab. 273. 4. Bac. Ab. 28. Tidd's Practice, 240. 1. Term Rep. 478.



## Trinity Term,

### 1. Car. 1. In the Common Pleas.

*Sir Henry Hobart, Knt. Chief Justice.*

*Sir Richard Hutton Knt.*

*Sir Francis Harvey, Knt.*

*Sir George Croke, Knt.*

*Sir Henry Yelverton, Knt.*

}

*Justices.*

*Sir Thomas Coventry, Knt. Attorney General.*

*Sir Robert Heath, Knt. Solicitor General.*

#### CASE I.

#### Lionell Farrington's Case.

An action *quidam*, and all proceedings thereon, shall stand unabated, notwithstanding the demise of the king; for it is a civil suit, and within the provisions of

1. Edw. 6. c. 7.

Moor, 748.

1. And. 45.

7. Co. 31. a.

Dyer, 165.

Hutton, 82.

3 Lev. 207-398.

Lut. 196.

Sav. 56.

Cro. Eliz. 138.

Hard. 161.

Stra 43. 782.

1. Com. Dig.

229.

Cowp. 389

**D**EBT was brought upon the 23. Eliz. c. 1. f. 5. against *Thomas Prince* and his wife, *ad respondendum* one hundred and twenty pounds for the recusancy of his wife, and absence from church for eleven months, viz. from the 23d of September 21. Jac. 1. to the day of the writ: *per quod actio accrevit eidem domino regi et LIONELLO FARRINGTON; qui tam, &c. ad habendum* the said one hundred and twenty pounds.

Upon this declaration the defendant demurs; "*pro eo quod declaratio ipsius LIONELLI minus sufficiens in lege existit ad ipsum LIONELLUM, qui tam, &c. versus ipsum THOMAM manutenendum, &c. unde petit judicium. Et quod predictus LIONELLUS, qui tam, &c. ab actione sua predicta versus eos habendum precludatur. Et predictus LIONELLUS, qui tam, &c. ex quo ipse sufficientem materiam in lege, ad actionem predictam versus eos manutenendum superius declaravit, &c.*" And they joined in demurrer, which was entered in *Hilary Term*.

**KING JAMES** departed this life in the vacation following; and it was moved in *Easter Term*, Whether the original writ, declaration, pleading, and demurrer upon that action, being brought by the infant for the king and himself, should be abated by the demise of the king, as an original brought by two, where by the death of either the writ shall abate; or as writs original brought by the king in his own name only, as it is in 7. Co. 30. or, Whether the writ and declaration only shall stand and not be discontinued, as it is resolved in the said case? or, Whether the writ and declaration and all proceedings thereupon shall stand by the statute of 1. Edw. 6. c. 2. as it shall do in writs of debt betwixt common persons (a)? And because no precedent had been produced in such cases, and many precedents were, that those only should stand; but that all demurrers and pleadings to informations were determined,

**THE COURT** advised until this Term, and ordered, that precedents should be searched to know what had been done in actions of debt upon penal statutes, brought by information for the king and party.

(a) By 1. Ann. c. 8. no writ, plea, process, or other proceeding on any indictment or information, or for any debt or account to her majesty or successors, shall be discontinued and null without day by the demise of the crown.

And

And now being moved again, and informing that there could not any precedents be found, and that such writs upon that statute had not been frequent, but of late, THE COURT resolved, that this writ and declaration, with all the proceedings thereupon, should stand; for it is merely the suit of the party, and within the statute of Edward the sixth, which shall not be discontinued or abated; for although the writ be, "*quod reddat domino regi et informatori*," yet it is presumed for himself, he being as the original party only; for the statute appoints, that no protection or wager of law shall be therein. And the pleading upon this writ shews as much, viz. "that the plaintiff Farrington shall maintain his action," and that "the declaration is not sufficient to compel him to answer to the informer," never mentioning *the king*. And the replication and joining in demurrer is only by the informer, viz. that "it is not sufficient to bar him of his action." Whereupon THEY ALL RESOLVED, that not only the writ and declaration, but all pleadings thereupon and the demurrer should stand. 7. Rep. 30. Dyer, 125. 6. Edw. 6. Fitzherbert, "*Nonfuit*," 13.

LIONEL  
FARRINGTON'S  
CASE.

3. Lev. 395.  
2. Hawk. P. C.  
393.

George Venables' Case.

CASE 2.

THIS Term A WRIT OF PRIVILEGE was signed by all the justices of the common pleas for George Venables, a clerk under the *custos breviarum*, to free him from being a soldier, reciting, That it is the custom and privilege of the court time whereof, &c. that neither the attornies nor clerks of the court shall be pressed for soldiers, nor elected to any other office, *sine voluntate sua*, but ought to attend the service of the court. Vide Lord Coke's Entries, 436. where the like writ of privilege was granted to a clerk of the king's bench to discharge him from being pressed for a soldier.

The clerks and  
attornies of the  
king's bench  
and common  
pleas are entit-  
led to a writ of  
privilege to pro-  
tect them from  
being impressed.  
Noy, 113.  
1. Saund. 67.  
Off. Br. 164

174. 176. Barnes, 37. 42. Ray. 173. Strange, 1143. Post. 585. 1. Bl. Rep. 636. 2. Bl. Rep. 1125. 4. Burr. 2111. 1. Com. Dig. 450, 451. Cowp. 512. 518.

Memorandum.

CASE 3.

UPON Monday the twentieth of June this Term, being the first day of Oclavis Trinitatis, A WRIT OF ADJOURNMENT was delivered to the justices to adjourn the two returns of Oclavis Trinitatis, et Quindena Trinitatis, usque tres septimanas post Trinitat. which was die Lunæ the last week; and that all pleas and procefs and all returns of sheriffs should be adjourned to that return.

Two returns of  
Trinity Term  
adjourned by a  
writ of procla-  
mation on ac-  
count of the  
plague.

The writ was dated 18th June, which was die Sabbati in the first return; and mentions, that "WHEREAS the pestilence much increased in London, the suburbs and parts of Westminster, and if the subjects of all parts of the realm should resort hither for law causes, it would be very dangerous to increase the sickness, to the peril of the king's person, and of foreign states resorting to him; THEREFORE the king, by advice of his council and judges, &c. had appointed, &c."

Dyer, 225.  
Cro. Jac. 16  
1. Bl. Rep. 530.  
1. Com. Dig.  
232.

Proclamations thereupon issued, bearing date the 18th June, 1. Car. 1. signifying the king's pleasure to adjourn these two returns until the last return (a); and that the last return should be held only for continuance of causes and procefs, and for the joining of issues;

1. And. 279.  
Jones, 84

MEMORAN-  
DUM.

issues; but that no proceedings should be upon demurrers or special verdicts, nor any judicial hearings in any of the courts of chancery, star-chamber, court of wards, court of requests, dutchy or exchequer chambers: and that no persons should be compelled to appear in person, but by attorney; with A PROVISIO, that all accomptants and parties appointed to pay money into the exchequer should hold their days in the exchequer to account.

And thereupon the justices of the king's bench, common pleas, and barons of the exchequer, sat in their several courts, and heard divers motions in their respective courts (but none upon any demurrers or special verdicts), and so continued until eleven of the clock that morning: and then, in the common pleas, THE WRIT OF

Cro. Jac. 231—  
446.

ADJOURNMENT, ensealed and inclosed in wax with the great patent seal, was opened, and three proclamations made to hear the writ of adjournment read; which being done, the cryer rehearsed the effect of the writ of adjournment in *English*, that all pleas, process, and appearances thereunto, were adjourned until *tres Trinitatis*.

Dm. Ab. 244.  
Dyer, 225, b.

And then THE COURT rose without doing aught else: nor were there any essoigns or proceedings made upon that return. And upon *Monday* in *tres septimanas Trinitatis* (being the day of essoigns of the said return) the day following, and the last day of the Term, the court sat again and heard all motions; but none upon demurrers or special verdicts, by reason of the proclamation aforesaid: and all recoveries, fines, and motions for proceeding to trials, were as if it had been in full Term. *Vide Trin. 4. Edw. 4. pl. 20. Trin. 11. Edw. 4. pl. 37. Trin. 21. Edw. 4. pl. 37. Mich. 5. & 6. Elizab. Dyer, 225.*



# Michaelmas Term,

I. Car. I. In the Common Pleas:

## A T R E A D I N G.

Sir Henry Hobart, *Knt. Chief Justice.*

Sir Richard Hutton, *Knt.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

} *Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Memorandum.

CASE 1.

THE KING, by proclamation three weeks before the beginning of Michaelmas Term, in respect the sickness continued so great at London and the parts thereto adjoining, signified his pleasure, That the said Term should be adjourned from *Octabis Michaelis* until *Mense Michaelis*; and on the first day of *Octabis Michaelis* JUSTICE YELVERTON, *Puisne Judge*, had a writ to adjourn accordingly, it being his turn to keep the *essoigns*. The courts of Westminster Hall adjourned to Reading in the county of Berks.

The like writs of adjournment were directed to the justices of the king's bench and barons of the exchequer; and the *puisne* judge and baron of every court came to *Westminster* the first day of the return, *Post. 17.* being the day of *essoigns*, and read the writ of adjournment of their courts only, and did nothing else.

At *Mense Michaelis* the justices of every court had other writs directed to them to adjourn, until *Craftino Animarum*, to *READING*; and the king, by proclamation bearing date the 11th of *October*, signified his pleasure, that his courts of chancery, requests, wards, star-chamber, dutchy, and receipt of the exchequer, should be there held. Cro. Jac. 17. Jones, 84. Dyer, 225. b.

Accordingly, the first day of *Mense Michaelis*, which was the day of *essoigns*, the *puisne* judges of all the courts of the king's bench, common pleas, and exchequer, came to *Westminster* and read the said writs, and adjourned the Term unto *Reading*.

### Memorandum.

CASE 2.

IN the mean time, viz. the 27th of *October*, JOHN WILLIAMS, *Lord Keeper* of *Lincoln*, *Keeper of the Great Seal*, was discharged of his place; and upon the 30th of *October*, being *Sunday*, SIR THOMAS COVENTRY, of the *Inner Temple*, knight, the King's Attorney, was made *Keeper of the GREAT SEAL*. The same day SIR ROBERT HEATH, the King's Solicitor, was made *Attorney-General*; and RICHARD SHELDON made Solicitor, and knighted; both being of the *Inner Temple*. Williams discharged, and succeeded by Sir T. Coventry. Heath and Sheldon promoted.

Memo-

## CASE 3.

The day of nominating sheriffs may be adjourned by the king a time after the morrow of *All Souls*.  
Post. 595.

Dyer, 215.  
2. Inst. 559.  
2. Com. Dig. 581.  
2. Bl. Com. 340.  
4. Bac. Ab. 433.

The *puisne judge* of each court shall sit to take *essoigns* on the first return;

but the *full court* not till the *quarto die post*.—Post. 102. 200. Dyer, 225. b. Cro. Jac. 129. Dan. Ab. 244. 3. Bl. Com. 278. 1 Term Rep. 16. 3. Term Rep. 185.

(a) B. 24. Geo. 2. c. 48. f. 12. which, with the statute 16 Car. 1. c. 6. abbreviates *Michaëlmas Term*, it is recited, That whereas by the abbreviation of *Michaëlmas Term* the morrow of *All Souls* will not be in full Term, and thereby will prove inconvenient for the purpose of ordaining sheriffs pursuant to 14. Edw. 3.

c. 7. and enacted, that the officers and persons who ought to assemble at the exchequer yearly on the morrow of *All Souls* for the ordaining and nominating sheriffs, shall not assemble on that day, but on the morrow of *St. Martin*, at the exchequer, in like manner, and for the same intent and purpose.

## Memorandum.

UPON the morrow of *All Souls*, being *Thursday*, and the day appointed by the statute of 9. Edw. 2. c. 2. and 14. Edw. 3. c. 7. (a) 23. Hen. 6. c. 8. and 21. Hen. 8. c. 20. for the chancellor, treasurer, and judges to meet in the *exchequer* to nominate persons to be made sheriffs for all counties, it was much doubted whether all the justices were to come thither, it being the day of *essoigns*, and to sit in court; or whether they might stay until *quarto die post*, and that one of them only should come the first day to keep the *essoigns*. And by reason of the shortness of the time from the change of the lord-keeper, it was appointed by the king, that the day of the *billing of sheriffs* should be deferred from the usual day; and that all the justices, except the three *puisne justices*, who were to keep the *essoigns*, should not come until *Saturday*; and that no court should sit until *Monday*: for they held, that the *quarto die post* of the return is properly the day for sitting, and not before, although it be after adjournment; as it is, the Term being without adjournment.

## CASE 4.

A prisoner in execution shall not have a *habeas corpus* returnable at a distant period in order to afford him an opportunity of going at large with his keeper in the intermediate time; and to suffer a prisoner to go at large under colour of such a writ, is an escape.

Ld. Raym. 241.  
2. Lev. 109.  
Cro. Eliz. 5.  
3. Co. 44. a.  
1. Roll. 803.  
Hob. 202.  
Post. 466.  
Moor, 257. 229.  
1 Mod. 116.

Stra. 429. 951. 503. Hard. 476. Barnes, 222. 386. 3. Com. Dig. 182. 2. Show. 229. And see 8. & 9. Will. 3. c. 26. 2. Bl. Rep. 1049. 2. Bac. Ab. 238, 239. 2. Term Rep. 5. 126.

## Memorandum.

UPON the *Tuesday* following all the justices were assembled at THE LORD KEEPER'S house, to be conferred withal, Whether it stood with law, or was convenient, to grant a *habeas corpus* to the Warden of the Fleet, or to the Marshal, by their keepers or others, to have any prisoner who was in execution to appear at a day certain the next Term in court; and, under colour thereof, that the said prisoner should go at large with his keeper in the vacation or Term time, and return to prison at the time appointed?

And all the JUSTICES AND BARONS agreed, That it was not allowable or justifiable in law; but *The Warden* and *The Marshal* have only a convenient time to bring the prisoner accordingly into court, and to carry him back again to prison; and if they suffer him to go at large for any longer time than is convenient (and the law shall adjudge what is convenient), it is an escape in him.

And THE LORD KEEPER and ALL THE JUDGES agreed, That they would not grant any *habeas corpus* returnable for a longer day than the necessity of the case required; and not otherwise than stands with law, as in debt, trespass, and other actions, where bail is to be put in to answer to suits. And they admonished the Warden of the Fleet, that under colour of such writs he should not suffer prisoners to go at large, upon peril to be charged with escapes.

Sir

Sir John Isham *against* York.

## CASE 5.

**ACTION FOR WORDS.** Whereas the plaintiff is and hath been justice of the peace of the county of *Northampton* for ten years, that the defendant, to scandalize him in his place, and to cause him to be amoved out of commission, spake these words: "I have been often with Sir John Isham for justice, but could never get any at his hand but injustice."

After verdict upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, That these words are not actionable; for it is not said that he offered him injustice in his office of justice, nor that he complained to him for justice as justice of the peace, and he denied it, but generally, that he could not have justice; and it might be that he complained to him for matters betwixt party and party for private offences, wherein he could not have redress as from a justice of peace.

CREW, *Serjeant*, of counsel with the plaintiff, afterwards at another day shewed, That the plaintiff declaring that he was a justice of peace, and that the defendant intending to scandalize him in his place, and cause him to be removed, had spoken, &c. and being found guilty thereof, it must be intended those words were spoken upon that occasion and of him as a *justice of peace*, and not of him as a *private person*, or for any private occasion; and compared it to the Case of *Stuckley v. Bulhead*, 4. Co. 16. a.

And of the same opinion was ALL THE COURT; and thereupon judgment was given for the plaintiff.

To say of a justice of peace, "I have been often with him for justice, but could never get any at his hand, but injustice," is actionable. Post. 223. Moor, 141. 1. Roll. Ab. 571. 1. Vent. 50. 1. Mod. 23. 3. Mod. 71. 1. Sid. 432. Cro. Eliz. 358. Cro. Jac. 56. 90. Hest. 161. 1. Com. Dig. 181. Stra. 617. 1168. Fort 206. 2. Ld. Ray. 1369. Cowp. 276.

Smith *against* Crasshaw, Ward, and Ford.

## CASE 6.

*In the King's Bench.*

**THE PLAINTIFF** brought an action on the case against the now defendants, For that they had falsely accused him of treason at *D.* in the county of *Norfolk*, and had caused him at the said town to be apprehended by the constable, and brought before a justice of peace, who committed him to *Norwich* castle; and that at the assizes there they falsely and maliciously had exhibited a bill of indictment of treason before the justices of assize, and falsely and maliciously affirmed it to be true, by reason whereof he was detained in *Norwich* prison until discharged by proclamation.

Upon not guilty pleaded, and verdict for the plaintiff, in *Michaelmas* Term, 20. Jac. 1. it was moved in the king's bench in arrest of judgment upon exceptions then shewn, and judgment thereupon, *quod querens nihil capiat*, &c.

It was there revived by a new action on the case, in nature of a conspiracy, as formerly. The defendants pleaded special matter of excuse, and traversed the malicious accusation; which was found against them, and two hundred and forty pounds damages given.

It was moved in arrest of judgment, That this action lies not, because there never was any precedent seen that any such action or writ of conspiracy for such cause was brought; nor is it ever mentioned in any of our books (for the mischief which might ensue to the state if men should be deterred from discovering treasons).

Ld. Ray. 378. 1169. 1. Stra. 193. 4. Burr. 1971. 1. Com. Dig. 157. 1. Hawk. P. C. 347. Cowp. 37. Dougl. 25. 1. Term Rep. 225.

An action on the case in the nature of conspiracy will lie for falsely and maliciously causing a man to be apprehended, imprisoned, and indicted for treason. Post. 553. Latch. 79. 1. Roll. Ab. 112. Jones, 93. Bendloe, 13. 152. 2. Bullst. 271. 4. Co. 16. 9. Co. 55. F. N. B. 114. 2. Inst. 562. 638. Co. P. C. 143. 222. Cro. Jac. 358. Cro. Eliz. 70. 134. 4. Bl. Com. 136. C. 347. Cowp.

But



SMITH  
against  
CRASHAW  
and Others.

BUT ALL THE JUSTICES, after divers motions in several Terms, and long consideration of this Case (being the first precedent which can be shewn) RESOLVED, That the action well lies; for it being alledged to be falsely and maliciously and by conspiracy exhibited, and the defendants by the verdict found to have falsely and maliciously exhibited it, it is not reason it should be dispunishable; for then no person would be safe, if such practices should be suffered, and the parties endangered thereby should have no remedy: and therefore they adjudged it for the plaintiff.

NOTE, The statute of 33. *Edw. 1. c. 2.* and the writ of conspiracy, do not in particular mention for what cause, but generally declare, "If any falsely and maliciously conspire to procure any to be indicted." And here in this Case, it being set forth, that they falsely and maliciously accused him of treason where they knew it to be false, and falsely and maliciously had conspired to cause him to be indicted, and falsely and maliciously exhibited an indictment, and had sworn the matter thereof to be true, whereas it was false, and they knew it to be false; and it is traversed that they did not falsely and maliciously accuse him and exhibit the indictment, which also is found against the defendants (so the substance of the declaration is found against them); it is good cause of action, and the defendants are not to be excused of such falsities, nor the law will not suffer the defendants to go unpunished. Wherefore, by the opinion of all the justices in the king's bench, who delivered their opinions *seriatim*, viz. SIR RANDOLPH CREW, *Chief Justice*, DODERIDGE, JONES, and WHITLOCK), it was adjudged for the plaintiff.

Sec 8. Hen. 6. c. 10. and 18. Hen. 6. c. 12.

#### CASE 7.

#### Green's Case.

Quare, If the spiritual court can excommunicate a husband for refusing to pay for transmitting a record against himself in a suit by his wife?  
2 Roll. Ab. 301.  
Ray. 95. 123.

GREEN prayed a prohibition to the ecclesiastical court at *Salisbury*, Because his wife sued him there to be separated from him *propter scævitiā*.

Sentence was there given for the husband against the wife, and he enforced to pay all the costs for his wife. Afterward she appealed; and because the husband would not answer the appeal against himself, and pay for the transmitting of the record, he was therefore excommunicated; and now prayed a prohibition.

THE COURT conceived the Case to be very hard, that he should be enforced to spend his money against himself; but because it was alledged that the course was so in the spiritual court, they would advise until the next Term; and ordered to stay their proceedings in the mean time.

#### CASE 8.

#### Cook against Younger.

A grant by a bishop of an office with an ancient fee for life is good, though the rent be reserved half yearly where it was before by the year; nor need it shew for whose life it was made, or the particular days on which the fee is to be paid. Post. 47. 259. Bridg. 30. 5. Co. 5. b. 6. Co. 38. a. Cro. Jac. 76. Cro. Eliz. 636. Co. Lit. 44. b. note (1). Moor, 759. 3. Bao. Ab. 723. 3. Com. Dig. 253. Dougl. 573. 3. Term Rep 665.

ACTION UPON THE CASE. Whereas the office of the under-stewardship of the courts of the manor of *Keysham*, and others the manors of the bishop of *Gloucester*, was anciently an office grantable for term of life, with the fee of three pounds six shillings and eight-pence by the year; and whereas a former bishop of *Gloucester* had granted to the plaintiff the said office for life, with the fee of three pounds six shillings and eight-pence payable annually

at

at the two Feasts of the year, viz. at the Annunciation of the Virgin Mary and at St. Michael the Archangel, issuing out of the said manors; and that the said bishop died, and that the plaintiff was ready to keep the courts of the now bishop; but the defendant, pretending a grant made to him from the said bishop's successor, disturbed him from keeping of them.

COOK  
against  
YOUNGER.

After not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, That this grant was void to bind the successor of the bishop :

FIRST, Because the prescription is, that the said office is grantable with a fee of three pounds six shillings and eight-pence by the year, and here the payment is appointed to be at two Feasts of the year, and so not warranted by the statute.

SECONDLY, Because the prescription is, that the office is grantable for life, and he doth not shew for whose life, and it may be for the life of the bishop who was grantor.

But none of these exceptions were allowed; and to confirm their opinions, the Case of the Dean and Chapter of Worcester, in 6. Co. Post. 283. 37, 38. a. was vouched, that the days of payment are not material where no less than the ancient rent is reserved yearly; and that the prescription being to grant for life, shall be intended to be for the life of the grantee.

THIRDLY, It was objected, That here was a mis-trial, the disturbance being alledged to be in the court at Keysham, and so in other manors where no vills are, and the trial being *per vicinetum* of the manors, whereas it ought to be of the vills wherein the manors are, it therefore was not good, nor aided by the 21. Jac. 1. c. 13.

Venue from the manors is good, if some are alledged within the proper villa. Post. 162. 312. 480. Co. Lit. 125. b. 6. Co. 14. b. 1. Bac. Abr. 1. 3. Bac. Abr. 173. 3. Term Rep. 387.

But THE COURT held, that in regard some of the said manors are alledged to be within those vills, and that the *venue* being of the manors, it shall be good by the statute (a) although it were of fewer or more places than it ought to be; and therefore judgment was given for the plaintiff.

(a) Vide 1. Jac. 1. c. 23. 16. & 17. Car. 2 c. 8. 4. & 5. Ann. c. 16. and 24. Geo. 2. c. 18.

### Bryan against Wetherhead.

CASE 9.

Trinity Term, 20. Jac. 1. Roll 602.

**EJECTMENT.** Upon not guilty pleaded, a special verdict was found, That John Bryan, being seised in fee of a tenement called Keyshams in Alesbury (being copyhold of the manor of Alesbury, whereof Sir John Packington was lord), erected a building by incroachment upon six feet of the waste of the said manor, and adjoined it to the shop of the said house. Afterwards Sir John Packington, in 33. Eliz. by indenture demised to the said John Bryan the said six feet of waste, so built upon and adjoining to the said Keyshams, for an hundred years, ; who in 1. Jac. 1. surrendered the said tenement called Keyshams to the use of Mary Bryan and her heirs, and in 5. Jac. 1. assigned all his term in the said six feet of waste so built upon to the said Mary Bryan; who in 19. Jac. 1. by indenture let and demised to William Wetherhead the said tenement

The grant of a house cum appertinentiis will not pass an adjoining building not accounted parcel of the house, although held with it for thirty years. Vide post. 57. 169.

Hutton, 35. Cro. Eliz. 89. Keilway, 57. Co. Lit. 5. b.

56. b. Cro Jac. 121. 3. Com. Dig. 443 2. Ch. Caf. 27. 1. Lev. 131. 1. Sid. 241. 2. Peere Wms. 303. Bro. Ch. Caf. 331. 1. Term Rep. 498. 502. 2. Term Rep. B. R. 498 Dougl. 763.

ment

BRYAN  
against  
WETHER-  
HEAD.

ment called *Keyshams, cum pertinentiis*, HABENDUM for seventy years, who assigned all his estate to the defendant. And afterwards in the said nineteenth year of KING JAMES, the said *Mary* died intestate; and administration was committed to the said *Bryan*, who entered upon the said six feet of waste so built upon.

The question was, Whether by these words, "the messuage called *KEYSHAMS, cum pertinentiis*," this parcel of the shop, built as aforesaid and annexed to the other shop, should pass or no?

And it was resolved by ALL THE COURT, that it passed not; for being but a new *purpresture*, and added to the shop of the tenement in 33. *Eliz.* and not being found that it had been used altogether with the house, or reputed or accepted parcel thereof *ex vi termini*, nothing passed but what was parcel of the house from the time, &c. and the verdict hath found that it was not accounted as parcel of the house from any time after the purchase, and therefore it shall not pass by the words "*cum pertinentiis*," especially in a deed; but in a devise *HOBART, Chief Justice*, conceived peradventure it might pass. And judgment was given for the plaintiff.

## CASE 10.

## Memorandum.

The laws  
against recusants  
ordered to be  
put in execu-  
tion, and all  
fines and for-  
feitures to be  
immediately  
employed in the  
public service.

UPON the 13 November, this Term, SIR ROBERT HEATH, *Attorney General*, came into court, and brought with him a commission under the great seal, directed to the Lord Keeper, Lord Treasurer, Chancellor of the Exchequer, the King's Attorney and Solicitor, COMMANDING them and all justices of peace in their limits, that they should put in execution all the laws against recusants, according to the petition of the commons in the last parliament, and the king's gracious pleasure thereto signified; and further declared his pleasure, that all sums of money collected upon *estreats* should be employed to the maintenance of his ordnance, his forts, and places of defence; and if any should remain, it should be employed for the support of his navy, and should not be put into his public treasury, but by itself and for those purposes; and that all leases of recusants lands, or to their uses, should presently be called in, as far as by the law they may be; and that none shall make suit to have them for recompence of any service or other uses, but should be employed to the uses aforesaid.

## CASE 11.

## Sir Francis Vincent against Lesney.

Trespass will lie  
for killing

A HAWK, with-  
out specifying  
the species, or  
shewing that it  
was reclaimed;  
but in *trover*  
this must be  
shewn

Post. 89. 544.

F N B 86.

Dyer, 306. 5.

Co. 35.

Lut. 1359. 1374.

2. Lev. 201.

3. Lev. 536

Raym 16.

Salk. 666.

Hob.

283. Cro. Eliz. 126.

288. 545.

Cro. Jac. 262.

463. Carth. 396.

TRESPASS: For that the defendant *accipitrem ipsum FRANCISCI percussit* with his staff, upon which stroke the hawk died. The defendant pleaded not guilty; and it was found for the plaintiff, and damages assessed to six pounds. It was now moved in arrest of judgment that the declaration was not good, Because he doth not shew what kind of hawk she was, as *goshawk*, *lawner*, &c.; for *accipiter* is the genus, and in the declaration he ought to shew the species thereof: and it is here too uncertain; and compared it to *Plater's Case (a)*, where in trespass *quare clausum fregit, et pisces cepit*, &c. the declaration was ill, because he shewed not their

(a) 5. Co. 34.



number and kind, as carps, tenches, &c.—*Sed non allocatur*; for here declaring *quod accipitrem ipsius FRANCISCI*, &c. being but one, is sufficient, and not like to *Plater's Case*, which was altogether uncertain: and this Case is the stronger because it is after verdict, which hath found him guilty of killing the plaintiff's hawk.

SIR FRANCIS  
VINCENT  
against  
LESNEY.

SECONDLY, It was alledged, that the declaration was not good, Because it is said *accipitrem ipsius FRANCISCI*, and he doth not shew that she was reclaimed; for a hawk is *fera natura*, and, if not reclaimed, the plaintiff cannot have any property in her, nor can she be said to be *ipsius FRANCISCI*: and to confirm this *Spencer's Case* was cited (a).—But THE COURT held the declaration to be good enough, being in an action of *trespass* for striking and killing, &c. which he only may have who hath the possession. And it differs from *Spencer's Case*; for there it was an action of *trover* and *conversion*, which lies not but of an hawk reclaimed, and which may be known by her vervels, bells, or some other mark whereby notice can be taken of her owner. Whereupon it was adjudged for the plaintiff.

(a) Dyer, 306.

Andrew Farrer against Edward English.

CASE 13.

ASSUMPSIT. The plaintiff declares, Whereas in consideration he was content and would accept the sum of 12l. 10s. of the defendant in discharge of all reckonings and account betwixt the plaintiff and one *Thomas English* (the defendant's brother (b)), who was then out of the county of *Norfolk*, and would seal and deliver a general acquittance to the use of the said *Thomas*, as he should be required; that the defendant assumed and promised to the plaintiff, he would procure said *Thomas English*, when he returned into *Norfolk*, to seal and deliver a general acquittance to the plaintiff: and he alledges in fact, that he accepted the said 12l. 10s. in satisfaction of all reckonings; and that 1. May, 12, Jac. 1. at *Norwich*, he sealed and delivered a general acquittance to *Edward Smith*, to the use of the said *Thomas English*; and that upon the said first day of May, 21. Jac. 1. the said *Thomas English* returned into *Norfolk*; and that the defendant, licet requisitus by the plaintiff the said 1st of May, hath not procured the aforesaid *Thomas English* to make a general acquittance, *sed hoc facere penitus recusavit*. The defendant pleaded *non assumpsit*; and found for the plaintiff.

A. received money of B. in discharge of C. and agree to sign a release to the use of C.: the acceptance of the money is a good consideration for a promise by B. to procure a mutual release from C.; and after verdict a declaration on such a promise is good, without shewing why B. paid or A. received the money, or that the release B. sealed was sufficient; although it be averred to be delivered to a stranger to the use of C.  
Post. 77.  
Cro. Eliz. 143.  
Cro. Jac. 570.  
Cowp. 460.  
1. Term Rep. 62.

ATHOE, Serjeant, moved in arrest of judgment, FIRST, Because there is not any sufficient consideration why *Edward English* should pay, or the other should accept the said 12l. 10s. in satisfaction, and should make that promise.—*Sed non allocatur*; for he paying, and the other accepting, is sufficient.

SECONDLY, Because the consideration is not sufficiently alledged to be performed on the part of the plaintiff, being executory; for he alledgeth that he delivered a general acquittance, but shews not any whereby it may appear to the Court to be a sufficient acquittance.

(b) But now, by 29. Car. 2. c. 3. no action shall be brought to charge a defendant on a special promise for the debt, default, or miscarriage of another, unless

some memorandum or note thereof be in writing, and signed by the party or by his authority.

THIRDLY,

FARRER  
against  
ENGLISH.

THIRDLY, Because it was alledged to be delivered to *Edward Smith*, to the use of the said *Thomas English*, who is a stranger, and peradventure could not or would not deliver it to *Thomas English*; and it was the intent of the parties to have it delivered to the party himself, or to *Edward English*, who was party to the promise.

And for these two last reasons I held that the declaration was not good; but the LORD HOBART, HARVEY, and YELVERTON, conceived the declaration to be well enough; for the promise being general, "to seal and deliver a general acquittance to the use of the said *Thomas English*," is sufficient, without alledging that he delivered a general acquittance according to the words of the promise; and the words being, "that he shall deliver to the use, &c." and he alledging that he delivered to "*Edward Smith*, to the use, &c." is also good enough, especially after verdict upon *non assumpsit*, wherein he denied the promise, but not the performance of the consideration.— But LORD HOBART said, if he had demurred upon the declaration because he did not shew the said acquittance, it might peradventure have been otherwise. And it was adjudged for the plaintiff.

## CASE 13.

## Whyte against Rylden.

*Trespass and trover for abusing and converting a horse lent may be joined, and the venue laid where either the abuse or conversion happened; and a verdict for entire damages is good.*

J. Lutw. 98.  
Hobart, 187.  
L. Bac. Abr. 31.  
2. Term Rep.  
12.

ACTION ON THE CASE. Whereas the plaintiff, at *London*, such a day and year, *accommodasset* to the defendant a gelding *ad equitandum ab LONDON usque civitatem EXONIE, et ibidem salvo redeliberandum* to the plaintiff; that the defendant, intending to deceive the plaintiff, rid upon the said gelding from *London* to *Exon*, and from *Exon* to *London*, and by that riding so much abused the said horse that he became of little value; and notwithstanding the plaintiff, at *Exon*, such a day and year, required of him the re-delivery of his said gelding, he then refused and yet refuseth to deliver him; and the same day, at *Exon* aforesaid, converted the said gelding to his own proper use, to his damage of TWENTY POUNDS.

The defendant pleaded not guilty; and found against him, and damages TEN POUNDS.

And it was now moved in arrest of judgment by RICHARDSON, *Serjeant*, that this declaration was not good, to join together in one action the non-delivery of the horse, according to the contract at *Exon*, and the conversion to his own use and the misusing him in the journey, which are all several causes of action.

Also it appeareth, that here was not a good trial, because the bargain was at *London*, and the tort was alledged in riding back to *London* and the mis-user in the journey: and the trial ought to have been at *London*, where the beginning of the contract was, and not at *Exon*, where the conversion was alledged.

Also, entire damages being given for all these torts, whereas the sole cause of the action was, for that the gelding was not re-delivered to him, it is not good.

But ALL THE COURT delivered their opinions *seriatim*, that the trial was good, and the damages well assessed:

FIRST, Because the principal tort was, the not delivering upon request, at *Exon*, according to the contract; and then when he denied

nied the re-delivery, and after converted him to his own use, the plaintiff may well have an action for both, and together (a). And although peradventure the defendant might have demurred, as LORD HOBART conceived, for the doubleness of the declaration (b), yet when he demurred not to it, but pleaded not guilty of the premises, and is found guilty, that makes the declaration good; and there is not any cause to stay the plaintiff's judgment.

SECONDLY, The trial is good *de vicineto de Exon*, because the tort is supposed to be done there, and not at *London* (c).

And THIRDLY, The entire damages are well assessed for the torts alleged in the declaration. Whereupon it was adjudged for the plaintiff. *Vide 7. Co. 1. Bulmer's Case, and Post. 186.*

(a) 2. Lev. 101. 3. Lev. 99 Ray. 211. B. R. H. 129. 4. Bac. Abr. 11, 12. Salk. 10. 5. Mod. 91. 1. Willf. 228. (c) Hob. 1<sup>st</sup> 8. Cro. Jac. 150. 7. Co. 2. Willf. 319. 3. Willf. 456 1. Com. Dig. 2. 1. Lev. 114. 286. 3. Leon. 141. 122. Strange, 716.

(b) Hob. 295. 1. Vent. 198. 222.

Castle again? 1 obbs.

CASE 14.

Trinity Term, 21. Jac. 1. Roll 2827.

**EJECTMENT** for lands in *Donnington*. Upon not guilty pleaded, a special verdict was found, that *William Read* being copyholder for life of certain lands, parcel of the manor of *Donnington*, paying fifteen shillings a-year to the lord of the manor; and that KING HENRY THE EIGHTH being seised in fee of this manor, anno tricesimo quinto regni sui, for the sum of 854l. granted by his letters patent to *Richard Andrews* and *Peter Temple*, to them and their HEIRS, inter alia, "omnia messuagia, terras, tenementa, redditus, reversiones, servitia, et hereditamenta sua, in DONNINGTON subscripta, viz. totum illum annualem redditum quindecim solidorum et alia servitia exeuntia de terris, WILLIELMI READ (et sic diversos alios redditus de COPYHOLDERS), ac totum illud messuagium et sex virgatas terræ, in DONNINGTON, in tenurâ J. D. habendum et tenendum, omnia prædicta messuagia, terras, tenementa, redditus, reversiones, servitia, et hereditamenta, in DONNINGTON prædict. to the said *Richard Andrews* and *Peter Temple*, and their heirs:" and, Whether the said patent was a good patent to convey the said lands to the tenure of *William Read*, as aforesaid? they prayed the discretion of the court: and if it were a good patent, they found for the defendant; and if not, they found for the plaintiff.

And thereupon it was argued by BRIDGEMAN, for the plaintiff, and by CREW, for the defendant.

BRIDGEMAN shewed that it cannot be a good patent to convey those lands to *Andrews* and *Temple*, because nothing is granted but the rent of fifteen shillings, and the services of *William Read*, whereof is intended only the rents and services which are due from him as a copyholder: and there is not any mention of lands to be granted, or that it is copyhold; and it shall not be said to be a passing of the freehold of the copyholder; and therefore the king being deceived in his grant, nothing passed from him, and so the grant void.

SERJEANT THOMAS CREW shewed, that this patent was to pass the rent of the copyholder, and freehold of the copyholder in fee, otherwise the patent should be construed void, wherein these words

The king being seised in fee of the manor of *D.* grants "all his messuages, lands, rents, reversiones, and hereditaments in *D.* hereafter named, viz. all that annual rent of fifteen shillings and other services issuing out of the land of "A. B." who was a copyholder for life of lands parcel of the said manor, at the rent of fifteen shillings a year. This grant is not sufficient to convey the land of the copyholder; for rents and seisin only are mentioned

2 Co. 16 b.  
1. Ter. Rep. 560.  
2. Ter. Rep. 498.



CASTLE  
against  
HOBBS.

of the king's grant are particularized, viz. "*totam illud messuagium et sex virgatas terræ, habendum messuagium, terras, &c.*" which implies that there is no misprision in the patent: for thereby a messuage is granted, which cannot be unless the copyhold should pass; wherefore he conceived it shall pass by construction. And he moved, that if the patent were void, yet the plaintiff could not have judgment: for it is found, that KING HENRY THE EIGHTH was seised in fee, and made that patent; which if void, then the lands are again in the crown: and no title being found for the plaintiff, he cannot have any judgment.

BUT ALL THE COURT conceived it was a void patent, to convey the land of the copyholder to *Andrews and Temple*. For, FIRST, there is not any land granted, but the rents and services of *William Read*, which is intended freehold; and there being none such, the grant is merely void.

In ejectment, on a special verdict, if the jury submit a particular point to the Court, the Court will intend everything that is necessary to their giving judgment. Cro. Jac. 94. Post. 130. 392. 458. 5. Bac. Abr. 287. 1. Peere Wms. 190. 1 Term Rep. 141. 2. Term Rep. 666.

And for the second point, they all conceived, forasmuch as the jury hath found that if it were a good patent, then for the defendant, if otherwise, they found for the plaintiff; it is intended, that there is a sufficient title found for the plaintiff, unless by this patent it be defeated and avoided; so that if the jury be satisfied that the plaintiff hath any good right by any other manner of title, the court ought not to doubt thereof, as it is resolved in *Goodale's Case*, 5. Co. 97. And it was adjudged for the plaintiff.

## CASE 15.

## Smith against Trinder et Alios.

Q<sup>n</sup>. Whether a lease made by a husband of lands purchased by him to the use of himself and his wife and their heirs, shall, by 28. Hen. 8. c. 28 be good against the wife after the death of her husband?

5. Co. 9.  
Cro. Jac. 378.  
1. Com. Dig. 561.  
5. Bac. Abr.  
210. 351.  
Cowp. 201.  
Lough. 53.

EJECTMENT on a lease by ELIZABETH countess of *Berkshire* of lands in *Water Eaton*.

Upon evidence to the jury at the bar, upon not guilty pleaded, the case was, That FRANCIS earl of *Berkshire* purchased the land in question to him and his wife and their heirs, in 41. Eliz. Afterward, in 16. Jac. 1. FRANCIS earl of *Berkshire*, without his wife, let this land to SIR LAWRENCE TANFIELD, late Chief Baron of the exchequer, for threescore years, if they lived so long, rendering 220l. yearly rent at the two usual feasts. During the term Francis died.

The question was, Whether this lease shall bind the countess by the 32. Hen. 8. c. 28. because she was not made a party to the indenture?

YELVERTON, HARVEY, and MYSELF, upon the first motion and perusal of the statute, conceived it should bind the countess.—For the body of the act is, "That all leases made of land, which the husband is seised of in right of his wife, of inheritance, or jointly with his wife by purchase, during the coverture, or before, shall be good and effectual; and that the wife shall have such remedy for the rent as he that made the lease." But then the PROVISIO is, "That such lease shall be made of such land, whereof the inheritance is in the wife by indenture, in his and his wife's name, and that she shall seal, and that the reservation shall be to him and his wife, and to the heirs of the wife." And that clause shall extend to lands of intail of the wife's jointly by purchase during the coverture: for clearly, by the body of the act, it is a good lease, and not within the PROVISIO; because it is not the

sole inheritance of the wife: and the PROVISIO extends only thereto; and it is out of the words and intent of the PROVISIO: for the appointment thereby is, that the reservation shall be to them and the heirs of the wife, which is not intended of a joint estate; but the reservation should be to both their heirs, so out of the intent and meaning of the PROVISIO.

SMITH  
against  
TRINDER.

8 Co. 72.  
5. Rep. 3.  
Powel on Pow-  
ers, 553.

But LORD HOBART doubted thereof, wherefore it was directed to have it found specially.

Upon the evidence it appeared, that anciently it was in lease, and occupied by two tenants; the one paid 60l. and the other 180l. and so for both 240l. yearly rent only: and now they are joined in one lease, and 280l. yearly reserved, which is more by 40l. a-year, than both the leases were before: and, Whether this be a good lease within the statute, &c.? Whereupon a special verdict was found at the bar for both points, and afterwards it was ended by arbitration.

Two farms usu-  
ally let to sepa-  
rate tenants  
cannot be let by  
one lease to one  
tenant by 32.  
Hen. 8. c. 28.  
though a greater  
rent be reserved.

5. Co. 4. a. &  
363. Cowp. 657.

139. b. 3. Keb. 380. Hardres, 325. 2. Vern. 531 542. Prec. Ch. 257. 3. Bac. Ab. 363. Dougl. 570.

### Hodgkinson against Wood.

CASE 16.

Trinity Term, 19. Jac. 1. Roll 596.

**EJECTMENT** of a lease of *William Rogers* for lands in *W.* in the county of *Salop.*

Upon not guilty pleaded, a special verdict was found, that *Thomas Rogers* was seised of the land in fee holden in soccage, and had issue by several VENTERS, *Francis* his eldest son, and *William* his second son; and devised the land in question to *Francis* his son for life, and after to the use of the heirs males of his body; and for default of such issue, to the heirs males of *William Rogers*, and the heirs males of their bodies forever; and for default of such issue, to the use of his own right heirs: and afterwards maketh a lease for thirty years to *William* his son, to begin after his death, and dieth without other alteration of his will. *William* enters, and surrenders his lease of thirty years to *Francis*, who enters and lets that land to the defendant for years yet enduring; and afterward *Francis* dieth without issue, *William* enters as heir male of the body, and makes this lease to the plaintiff.

If a man devise  
lands to A. and  
his heirs, and  
afterward lease  
such lands to a  
stranger for  
years, to com-  
mence after his  
death, this is no  
revocation of the  
devise of the  
inheritance, ex-  
cept only during  
the term—See  
the beginning of  
this case, Cro.  
Jac. 690.

1. Roll. Ab. 616.  
1. Chan. Ca.  
193.

Gibb Dev. 103.  
2. Atkins, 71.  
Ca. Ch. 193.  
1 Vern. 329.  
2 Vern. 496.  
3. Com. Dig.  
11.  
Powel on De-  
vises, 625.  
Dougl. 31.

Two questions were hereupon made:

FIRST, Whether this lease made to *William* for thirty years begin after the death of the deviser, and so being to begin at the same time, that the devise of the inheritance should take effect, be a countermand and revocation of that devise totally, or only quoad the term, and shall stand as to the inheritance (a)?—And as to that point ALL THE JUSTICES resolved, it is not any revocation of the inheritance, but only for the term, for they both may stand together; and there shall not be any revocation unless it be expressed that the tenant of the testator is changed, or that they cannot stand together. And here it may well stand with the inheritance: and for that point was cited the case of *Coke v. Bullock* (b), where one

(a) By 21. Car. 2. c. 3. No devise of lands, &c. shall be revocable but by some writing declaring the same, or by destroying the will; and no will of any personal

estate shall be altered by word of mouth, unless put into writing in the testator's life, and executed as the act directs.

(b) 100. 10. Jac. 49. Godolph. 455.

HODGKINSON  
against  
Wood.

devised land to his sister in fee, and afterwards makes a lease for sixty years unto her of the same lands, to begin after his decease, and delivers it to a stranger, to the use of his sister, which stranger did not deliver it unto her in the life of the testator, but afterwards, and she refused, and claimed the inheritance; it was resolved, because the devise and the lease made to one and the same person, beginning at the same time, cannot stand together in one and the person, that it was a countermand of the devise. But there they all agreed, except WARBERTON, *Justice*, that if the lease had been made to any other than the devisee, they might stand together, and the lease should not have been a revocation of the will as to the inheritance, but only during the term. Another case was cited of *Coward v. Marshall (a)*, where one devised lands by his will in writing to one of his younger sons in fee, and after by another clause in the same will devised the same lands to his wife for life, rendering annually to his said younger son twenty shillings. It was resolved that both these devises may stand, and that one is not a revocation of the other.—But YELVERTON, *Justice*, cited a case *(b)* adjudged in the king's bench, where one deviseth to one in fee, and afterwards makes a feoffment to the use of his wife for life, remainder to his right heirs, so as it is *quasi* the ancient reversion; yet because he departed with all the estate, it shall be a revocation of the devise in all, and shall not be good without a new publication: wherefore THEY ALL RESOLVED, that in this case there is not any revocation of the inheritance; and appointed there should be no more arguments at the bar as to that point.

By a devise to eldest son and the heirs male of his body; remainder to the heir male of the devisor and his heirs of his body; a son of the devisor by a second venturer shall take the remainder.

Co. Lit. 14. 22. 25. b.

Co. 1. 104. a. 3. Co. 97.

1. Rol. 841.

7. Mod. 207.

Rep. 630. 3

SECONDLY, Whether this devise to *Francis* and to the heirs males of his body, and for default of such issue to the heirs males of the devisor, and the heirs of their bodies, and for default of such issue to the right heirs of the devisor, be a limitation in tail to the heirs males of the body of the devisor, so that *William* may claim by this limitation an estate in tail as by purchase: or, whether it vested in *Francis* only, as being heir male to the devisor, and not by purchase; or if the inheritance in fee simple vested in him, for then his lease for years is executed out of the fee estate, and *William*, not claiming as right heir, is then bound by that lease made by *Francis*?—And of this point was more doubt conceived; wherefore they ordered it should be argued the next Term: and afterwards in *Hilary Term* it was moved again, and adjudged for the plaintiff.

Post 364. Hob. 30. Dyer, 156. Cro. Eliz. 109. 2. Leon. 25. 1. Mod. 226. 237. 1. Vent. 381. 2. Vern. 729. Eq. Cas. 117. Cowp. 31 771. See Dougl. 501. 1 Term Rep. 87. 488.

(a) Cro. Eliz. 721. Cro. Jac. 49.

(b) 1. Roll. Ab. 616.

CASE 17.

William Platt, Assignee of Richard Platt, *against* Plommer.  
Michaelmas Term, 20. Jac. 1. Roll 1759.

A copyholder in fee grants a lease, and afterwards surrenders to the plaintiff. *Quere* If he can maintain an action as

assignee against

COVENANT. Upon demurrer the case was, That a copyholder in fee, with the lord's licence, made a lease for twenty-one years by indenture, rendering rent, wherein the lessee covenants for himself his executors and assigns, with sufficient sureties, that he will erect a pale about such a close, and lay upon the lands de-

the lessee for non-performance of covenant? *Con. post. 44.* Cro. Jac. 305. Yelv. 223. Hob. 178. Carth. 205. Acc. 3. Lev. 327. 1. Salk. 185. Show. 285. Skin. 305.

misled



mised yearly forty loads of dung, and sufficiently repair the houses.— Afterwards the lessor surrendered to the use of the plaintiff and his heirs, who was admitted accordingly; and for not performing these covenants the plaintiff, as assignee, brings his action of covenant.

The question was, Whether the assignee may maintain this action by the common law, or by the statute of 32. Hen. 1. c. 34?

The defendant upon this declaration demurred.

The principal doubt was, Whether a copyholder, who comes to his tenement by surrender of the lessor, be such an assignee as may have an action of debt or covenant by the statute of 32. Hen. 8. c. 34?

SECONDLY, Admitting he be not within the statute, Whether by the common law (covenants being made by express words with the lessor, his heirs, and assigns) the assignee for these covenants may maintain this action.

This case was moved by HENRAGE FINCH for the plaintiff, and by CRAWLY for the defendant. Et adjournatur (a).

(a) See S. C. Co. Copy. p. 87.

### Knight against Harvy, Administrator of Harvy.

CASE 18.

Hilary Term, 22. Jac. 1. Roll 635.

DEBT brought in Hilary Term, 22. Jac. 1. upon an obligation of eleven pounds, dated 20 May, anno viceffimo regis nunc. The defendant impails; and in Easter Term, 1. Car. the declaration and plea of the defendant was entered, and he declared therein upon an obligation dated 20 May, anno 20. regis nunc. Afterwards, by order of the court, the said declaration was amended, and made regis Jacobi.

A mistake of the date in a declaration of debt on bond is amendable after plea pleaded.

Cowp. 407-452. Rep. 782.

The defendant pleaded thereunto a judgment upon another bond of one hundred pounds, dated anno quarto regis nunc (which was mistaken, for it ought to have been regis Jacobi), and that he had *riens en ses maines* but only to satisfy that judgment; and thereupon the plaintiff joins issue, "That the said recovery was made by fraud and covin;" and found for the plaintiff.

To debt on bond if the defendant plead judgment recovered on an impossible day, and the plaintiff reply *per fraudem*; on issue joined thereon, and verdict in his favour, the plaintiff shall have judgment.

This Term the defendant moved in arrest of judgment, That this plea is repugnant and impossible; that a recovery should be *anno quinto regis nunc*; and therefore the issue joined thereupon is naught, and no judgment can be given in this case.

Ante, 7. Post. 54. 78. 5. Co. 43. a. 8. Co. 93. Cro Jac 86. 678. Cro. Eliz. 227. Ld. Raym. 90.

But ALL THE COURT conceived, that so far as there was a default in the defendant's plea, although the plaintiff had joined issue thereupon, which is found to be false, and the defendant hath not confessed *assets* in his hands but only for that judgment, yet the plaintiff, having a good declaration, shall have judgment: whereupon it was adjudged for the plaintiff.

55. Hob. 326. Raym. 458. 1. Saund. 228. 1. Salk. 173. 5. Mod. 310. Carth 370. Gutw. 1380. 1. Burr. 299. 1. Term Rep. 784.

Sir

## CASE 19.

## Sir Edward Coke's Case.

Exceptions  
taken by  
Sir Edward Coke  
to the sheriff's  
oath of office,  
and resolutions  
of the Judges  
thereon.

**SIR EDWARD COKE**, late Chief Justice of the common pleas, and afterwards of the king's bench, and removed from his places, being made sheriff of the county of *Buckingham*; had a *dedimus potestatem* to take his oath annexed to a schedule; to which he took exceptions, for that there were more additions to the said oath than were in the ancient oath which is in **THE REGISTER**, and afterwards confirmed and appointed by the statute of 18. *Edw. 3. c. 4.*: he therefore conceived there ought not to be such additions unless by parliament. The additions were,

FIRST, "*That he should seek to suppress all errors and heresies commonly called Lollories, and should be assistant to the commissaries and ordinary in church matters:*" which part of the oath was added by reason of the statute of 5. *Rich. 2. st. 2. c. 5.* and 2. *Hen. 4. c. 15.* whereby it is appointed that the same should be taken by the sheriff, especially for those two causes. But he thereto certified, That those statutes are repealed by the statute of 1. *Edw. 6. c. 1.* and 1. *Eliz. c. 2.* and therefore ought not to be taken.

THE SECOND ADDITION was, "*That he should return reasonable issues:*" whereto he excepted, Because it is appointed by the statute, and penalties imposed for not performing it; and it ought not to be upon oath.

THE THIRD ADDITION was, "*That he should return all juries of the nearest and sufficientest persons:*" whereto he excepted, Because that part of the oath is not appointed by any statute; and it is against common practice that he himself should return juries, it being commonly done by the under sheriff, who is also appointed by the statute to be sworn.

THE FOURTH ADDITION was, "*That he should cause the statute of WINTON, and the statutes against rogues and vagabonds, to be put in execution:*" whereto he excepted, Because the statute of *Winton* is altered, and the statutes against rogues and vagabonds are appointed to be executed by the justices of the peace, and not by the sheriff.

Upon these exceptions THE LORD KEEPER assembled all the Justices to confer with them about the same. And as touching

THE FIRST POINT, They conceived it was fit to be omitted out of the oath, because it is appointed by statutes which are repealed, and were intended against the religion now professed and established, which before were condemned for heresy, and is now held for the true religion.

FOR THE SECOND ADDITION, They conceived it convenient and for the service of the king and subjects, and the greater part of them were of opinion, that an oath in this and the other points may be well enjoined by the king and order of state without parliament, and it may be well imposed upon the sheriff to take, being for public benefit and execution of the laws.

FOR THE THIRD ADDITION, It is not so strictly to be intended that he himself should return juries, but it ought to be intended according to the construction of law, that he himself, by himself or under-sheriff, should return juries; which is a sufficient performance; for the law saith, *qui per alium facit, per seipsum facit.*

For

SIR EDWARD  
COKE'S CASE.

FOR THE FOURTH ADDITION, It rests upon the former reasons, that this oath being appointed and continued divers years by direction of the state, although without the expresse authority of any statute law, yet may he well be continued for the public benefit in repressing such persons: and although authority be given to the justices of the peace to put those statutes in execution, yet it doth not take away the sheriff's right, who is THE PUBLIC CONSERVATOR (a). And so they delivered their opinions to THE LORD KEEPER at his house at Reading (b).

(a) Lamb. b. 1. c. 3. 12. Hen. 7. (b) See the 3. Geo. 1. c. 15. f. 18. for pl 17. 2. Hawk. ch. 8. f. 4. 5. Com. the present form of the oath to be taken Dig. 480. 3. Bac. Abr. 286. 4. Bac. by sheriffs. Abr. 449.

## Memorandum.

CASE 20.

THAT the last of this Term there came a writ from the king to the justices of the common pleas, commanding the court to be adjourned from Reading to Westminster in the county of Middlesex, and that all pleas and proceeding should be adjourned to Westminster, to be held there the day of *Ostabis Hilarii* (and like writs were directed to the justices of the king's bench and barons of the exchequer); and it was openly read there, and then the adjournment made accordingly, of all pleas, &c. unto Westminster, &c.

The courts adjourned from Reading to Westminster. Ante, 13.

Hilary



# Hilary Term,

I. Car. I. In the Common Pleas.

## AT WESTMINSTER.

Sir Richard Hutton, *Knt. Chief Justice.*

Sir Francis Harvey, *Knt*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

### CASE I.

### Memorandum.

The death of  
HOBART, C. J.  
See 4. Term  
Rep. p. 307.

IN this vacation SIR HENRY HOBART, *Knight and Baronet*, Chief Justice of the common pleas, died at his house in *Blyckling* in the county of *Norfolk*, being a most learned, prudent, grave, and religious Judge.

### CASE 2.

Sir Richard Udall *against* William Tindall, *Vicar of Alton.*

*Hilary Term, 22. Jac. I. Roll 733.*

Woad, growing  
in the nature of  
an herb, shall  
be considered as  
small tithes.

TRESPASS, for taking two loads of woad. Upon not guilty pleaded, a special verdict was found, that if woad be *minutæ decimæ*, then the jury find that the defendant is not guilty; if it be not *minutæ decimæ*, then they find for the plaintiff.

And it was argued by HENDEN, *Serjeant*, for the plaintiff, and by BRIDGEMAN for the defendant.

On the behalf of the plaintiff it was said, That inasmuch as it is so found without more circumstances, it shall not be intended to be *minutæ decimæ*; for it may be, that a great quantity of woad may be sown, and the greatest part of the commodity of the parish may consist in woad, and then it cannot be reputed *minutæ decimæ*: for although in their own nature they be *minutæ*, yet they now become *maiores*, if the greatest part of the profits of the parish consists therein: for *minutæ decimæ* are properly intended such which are but of small consideration in a parish, as herbs in a garden, and such like; therefore he said that woad sown in the fields is not *minutæ decimæ*; and that in 3. Jac. I. upon a special verdict in *Essex*, in the case of *Hertman v. Boxley*, it was resolved, that tithe of *welde*, which is a kind of grass growing amongst other grain, and commonly sown therewith, were not *minutæ decimæ*.

BRIDGEMAN, for the defendant, vouched *The Dean and Chapter of Norwich's Case (a)*, where it was adjudged upon a special verdict, that the tithes of forty acres of land planted with *saffron* appertained to the vicar and not to the parson.

(a) Reported under the name of *Beddingfield v. Freak*, Cro. Eliz. 467. Moor, 909. Owen, 74. Goldf 149.

HENDEN,

Hutton, 77.  
Bendl. 159.  
3. Lev. 365.  
2. Atk. 364.  
Palm. 222.  
2. Inst. 649.  
1. Roll. 643.  
Carth. 264.  
Skin. 356.  
1. Sid. 443.  
4. Mod. 184.  
2. Bull. 27.  
3. Com Dig. 93.  
Bubb. 169. 344.

HENDEN answered, That was not because they were *minutæ decimæ*, but for that upon the endowment found the allegation was that the parson should have tithe of corn and hay only.

UDALL  
against  
TINDALL.

But YELVERTON said, That was not the reason, but because they were accounted as *minutæ decimæ*, and appertained to the vicar.

And ALL THE JUSTICES resolved, That woad growing in nature of an herb, the title thereof ought to be reputed for *minutæ decimæ*; and judgment was given for the defendant.

Mary Peacock, Executrix of Richard Peacock against Steere.

CASE 3.

**R**AVISHMENT DE GARD. The plaintiff declares, That <sup>Plaintiff executor shall not pay costs.</sup> <sup>Post. 219.</sup> <sup>S. C. Hutton, 2. Lev. 165. 3 Lev 60. 375. Strange, 682.</sup> one John Steere held such land of the testator by *knights service*, and died leaving his heir within age; and that the testator seized the said ward and died thereof possessed, and afterwards the defendant ravished him; the issue being upon the *tenure*, was found for the defendant. The question was upon the 4. *Jac. 1. c. 3.* Whether the plaintiff shall pay any costs? because she counts that she brings her action upon her own possession.

And HUTTON, HARVEY, and MYSELF held, that the defendant shall not have costs; but YELVERTON *à contra*. *Vide Goldsmith v. Lady Platt (a), Haywarth v. David (b), and Fetherston v. Allybard (c).*

(a) Cro. Jac. 352. 2. Bu'lt. 284. (b) Mich. 3. Jac. 1. Cro. Jac. 229. (c) Cro. Eliz. 503. Godol. 168.

Easter





## Easter Term,

### 2. Car. 1. In the Common Pleas.

Sir Richard Hutton, *Knt. Chief Justice.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

} *Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Crumpe against Barne.

#### CASE 1.

**A**CTION FOR WORDS. Whereas the plaintiff was a citizen of *Gloucester*, and so had been for twelve years, and used all that time the trade of a shoemaker, that the defendant to defame him spake these words of him, "He is a *bankrupt rogue*."

After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment that these words were not actionable; for "*bankrupt*" is not spoken indefinitely, nor absolutely by itself, but as an adjective to "*rogue*;" so the words are extenuated. Also, a shoemaker is not such a person as may have an action for these words, no more than a labourer or husbandman; for he doth not live upon buying and selling, or upon credit, but upon his manual labour.

But IT WAS RESOLVED, that the action lies; for the addition of "*rogue*" to "*bankrupt*" doth not extenuate but aggravate it, and shews his malice: and a shoemaker is such a person as is within the statute of bankrupts; for he lives by his credit in buying leather, and selling it again in shoes, &c. and not upon his manual labour only, as labourers and husbandmen do. Whereupon it was adjudged for the plaintiff.

It is actionable to call a shoemaker "a bankrupt rogue;" for he is a trader within the statutes of bankruptcy.  
Cro. Eliz. 268.  
Cro Jac. 345.  
Skin. 292.  
3. Lev. 309.  
Bull. N. P. 39.  
4. Burr 2148.  
1. Com. Dig. 183. 503.  
2. Bl. Com. 76.  
Cowp. 750.

### Foster against Smith.

#### CASE 2.

**A**SSUMPSIT. Whereas the defendant was indebted to the plaintiff in seven pounds, that in consideration thereof he promised to pay, &c. The defendant pleaded *non assumpsit*, and found against him: and it was moved in arrest of judgment that the declaration is not good; because he doth not shew any cause of the debt, viz. by bond or otherwise: and although he hath pleaded *non assumpsit*, and it is found against him, yet the declaration being ill the verdict doth not aid it. It was therefore ADJUDGED for the defendant.

A declaration in *assumpsit* must state the certain cause of the debt.—*Vide ante*, 6.  
10. Co. 77. a.  
Cro. Jac. 207.  
213. 642.  
Hob. 5.  
Noy, 146.  
Doug. 5.

1. Bull. 153. 1. Sid. 182. 1. Show. 347. 1. Com. Dig. 152. Cowp. 826.

CASE 3. Anne Smith *against* Anne Lady Wade, Executrix of Sir William Wade.

If a name be mistaken in a *habeas corpora juratorum*, as Henry instead of William, it may be amended after verdict.

Hutton, 81.

3. Co. 3.

3. Co. 43.

Cro. Jac. 14.

354. 396.

Jones, 302.

1. Com. Dig.

321.

3. Bac. Ab. 275.

Cowp. 407. 425.

Dougl. 115. 135.

1. Term Rep.

782.

3. Term Rep.

657.

**A**SSUMPSIT upon a promise of the testator's. After *non assumpsit* pleaded, and verdict found for the plaintiff, it was moved in arrest of judgment, that the writ and declaration were against ANNE, executrix of SIR WILLIAM Wade, and the issue, record and *venire facias* were accordingly for a trial betwixt the said parties; but being tried by a *nisi prius* writ in London, the writ of *habeas corpora* was to have "*corpora juratorum, &c.*" betwixt the said ANNE SMITH and Lady Wade, executrix of SIR HENRY Wade, knight; so a misprision of HENRY Wade for WILLIAM Wade.

It was therefore moved in arrest of judgment, that it was a trial without warrant; for the record of *nisi prius* and the issue being against the executrix of William Wade, the *habeas corpora* was not sufficient; being by *NISI PRIUS* to try that issue.

But ALL THE COURT conceived, that inasmuch as the issue is good, the record of *nisi prius* good, the *venire facias* good according to the issue, although there be a misprision in the *habeas corpora*, it was but the fault of the clerk, and may be well amended; because there is not any alteration of the verdict, and it is well warranted by the former record: therefore it was appointed to be amended, and adjudged for the plaintiff.

CASE 4.

Swayne *against* Rogers.

In the Exchequer Chamber.

In trespass for a battery, if before judgment the force is pardoned, there shall be no *capiat*; but the pardon must be pleaded.

Post. 449.

Cro. Jac. 149.

2. Lev. 36.

Foster, 64.

Dyer, 28. a.

Plowd. 401.

**T**RESPASS FOR BATTERY in the king's bench, and judgment for the plaintiff.

Error in the exchequer chamber was assigned, for that the judgment was *capiat*, whereas the battery was before the general pardon, so as the fine is pardoned, and the judgment ought not to have been a *capiat* (a); for the Court is to take notice of the pardon and give judgment for the party, but not any fine.—*Sed non allocatur*: for the Court need not to take consueance thereof without demand of the party; and it doth not appear whether the party is any of the persons excepted, or one who is to have benefit of the pardon.

1. Mod. 71. 2. Hawk. P. C. 360.

If a verdict find *absolute damages* on a plea to which there was a demurrer, and *conditional damages* to which there was an issue, it is erroneous.

Post. 143.

1. Burr. 383.

Dougl. 377. 730.

1. Term Rep.

240.

**A**FTERWARDS it was shewn that the declaration was of assault, battery, and imprisonment; and the defendant as to the battery pleads a justification; whereupon the plaintiff demurred: and as to the imprisonment he pleads another justification; whereupon the plaintiff takes issue *de injuriâ suâ propriâ*, &c. and issue joined: and at the trial the jury found as to the plea for the battery, that the defendant did it *de injuriâ suâ propriâ*, and assessed damages five pounds and costs forty shillings; whereas they ought not to have meddled therewith, because a demurrer was thereupon, but only have found conditional damages if it should be adjudged for the plaintiff: and for the imprisonment they did not find the issue, but assessed conditional damages twenty shillings; so they found merely cross to what they

(a) See 16. & 17. Car. 2. c. 8. and 5. Eliz. 153. 178. Salk. 54. and 2. Bac. & 6. Will. 3. c. 12. Post. 178. Cro. Abr. 515. in notis.

ought, and the judgment upon this verdict for the five pounds costs and the forty shillings found by the jury *nullo habito respectu* of the twenty shillings was merely erroneous.—Wherefore, although it was prayed that it might be amended, it appearing to be the misprision of the clerk who entered the judgment, yet *non allocatur*; but the judgment was reversed.

SWAYNE  
against  
ROGERS.

Smith against Richardson.

CASE 5.

In the Exchequer Chamber.

**E**RROR upon an *assumpsit* in the king's bench; wherein the plaintiff declared, Whereas in consideration the plaintiff had sold to the defendant four bags of hops, whereof three bags weighed *septem centenas et unum quarterium centenæ*, ANGLICE, seven hundred and one quarter of an hundred weight; and the other bag weighed *ducentas centenas et dimidium unius centenæ*, ANGLICE, two hundred and an half weight; that the defendant assumed to pay according to the rate of seven pounds for every hundred of the said three bags, and according to the rate of six pounds ten shillings for every hundred of the other bag: *et dicit in factò* that the aforesaid three bags, according to the said rate, amounted to the sum of fifty pounds and fifteen shillings; and the aforesaid other bag, according to the rate aforesaid, attained to sixteen pounds five shillings, yet the defendant aforesaid, &c.

A promise in consideration of the delivery of *ducentas centenas lupulæ*, ANGLICE, 200 cwt. of hops, shall not be intended for two hundred hundred.  
Post. 386. 418.  
Bendl. 156.  
10. Co. 130. a.  
1. Lev. 33.  
1. Sid. 60.  
1. Com. Dig. 138.  
Cowp. 682.  
Doug. 158.

The defendant pleaded *non assumpsit*; and found against him, and damages given only according to the said rate before mentioned, and judgment entered.

A writ of error was thereupon brought in the exchequer chamber; and the error assigned was, For that *ducentas centenas et dimidium unius centenæ*, ANGLICE, two hundred and an half weight, &c. This ANGLICE is void and repugnant to that which the ANGLICE was before, and contrary to the propriety of the words: for *ducentas centenas* is two hundred hundred, so it is much more than the price reacheth to; and it is without sense, and therefore repugnant, and the declaration ill and judgment erroneous.

But ALL THE JUSTICES and BARONS held, that it was no error, being in disadvantage to the plaintiff and not material; for it rests only in damages, and the jury hath given according to that rate, so as there is not any prejudice to the defendant: and the issue being upon *non assumpsit*, and found as is alledged, it is good enough; and judgment was affirmed.

A Case out of the Court of Wards.

CASE 6.

**U**PON the eleventh of May this Term all the Justices and Barons being assembled, THE CHIEF BARON propounded a case depending in the court of wards, viz. Two jointenants to them and their heirs, the one of them makes a conveyance to the use of himself and his wife for a jointure and the advancement of his son: Whether this be an assurance within the statutes of 32. Hen. 8. c. 1. and 34. Hen. 8, c. 5. so as the king shall have the third part?

A conveyance by one of two jointenants in tail to the use of himself and his wife, and the advancement of his son, is not within the

statutes of Hen. 8. of wills. Vide 12. Car. 2. c. 24.

SIR



See *Might's Case*,

8. Co. 163. b.

3. Co. 31. a.

10. Co. 83.

Co. Lit. 76. 78.

2. Inst. 110.

3. Burr. 1489.

1 Bl. Rep. 476.

and Mr. Har-

grave's notes

(1), (3), (4),

Co. Lit. 111. b.

SIR RANDOLPH CREW, the Chief Justice, and THE CHIEF BARON were divided in their opinions from THE OTHER JUSTICES AND BARONS in this point, who all, upon that sudden motion, conceived it to be out of the statutes: for the words are, "*If any sole seised, or jointly with others, &c.*;" there in such cases the statute provideth, that the king shall have "the third part upon such conveyance:" but where two are jointly seised to them and their heirs, and the one makes a conveyance, this is out of the words of the statute of 32. Hen. 8. c. 1. and therefore ought not to be within the intent of 34. Hen. 8. c. 5. for that is a statute of explanation, and shall be construed only according to the words, and not with any equity or intendment; for there cannot be an explanation upon an explanation, as it is held in *Butler v. Baker* (a).—And JONES, Justice, said, it was so resolved in the court of wards by the opinion of the Chief Justice in the forty-third year of queen Elizabeth.

(a) 3. Co. 25.

#### CASE 7.

#### Memorandum.

A *scire facias* must issue from the court where the judgment was given; and *Qu.* What process shall be against an administrator in England to an intestate in Wales, against whom judgment in debt had been given at the grand sessions? for the record cannot be removed by *certiorari*.

1. Saund. 98.

2. Mod. 10.

Vaugh. 397.

417.

2. Bulst. 54.

Rep. 658.

AT the same time another question was moved amongst them: Where judgment is given in debt at the grand sessions in Wales, against a defendant inhabiting in one of those counties, and the defendant dieth intestate, and one who inhabits in London takes letters of administration; Whether any execution may be in Wales, because he neither inhabits nor hath any thing there? and if not, then, Whether that record may be removed into the chancery by *certiorari*, and sent by *mittimus* into the king's bench or common pleas, to the intent to take forth a *scire facias* upon it, to have lands out of Wales (or goods in the hands of the administrator liable to it there)?—And ALL THE JUSTICES AND BARONS conceived *quæreny*; for he may not have a *scire facias* in any court but where the judgment is given: and if such course should be used, all judgments in the courts in London or in inferior corporations would be removed and executed here; which would be a great inconvenience to the subject to make lands or persons liable to such judgments in other manner than they were at the time of the judgments: wherefore there is no remedy but to execute such judgments in their peculiar jurisdictions.

1. Lev. 291. 5. Com. Dig. 667. 2. Bac. Abr. 357. 1. Term Rep. 388. 3. Term

#### CASE 8.

#### Crane against Crampton.

In an *assumpsit* on a promise to pay such a sum on the marriage of the plaintiff, notice of the marriage need not be averred, nor the day that the request was made stated in the declaration.

S. C. Hutt. 80.

ACTION ON THE CASE on an *assumpsit*: That the defendant, in consideration of a *ruff-band* delivered to him by the plaintiff, promised to pay to him at the day of the said plaintiff's marriage the sum of three pounds; and alledgeth in fact, that he was married such a day, *et licet sæpius requisitus*, yet he hath not paid: and judgment was given upon *nihil dicit*.

After writ of enquiry of damages executed in Norfolk, it was moved in arrest of judgment, that the declaration was not good, because he doth not shew that he gave notice of his marriage before he married, for otherwise the defendant is not bound to take notice thereof; for it rests in the privity and knowledge of the plaintiff,

and

and not of the defendant: and it cannot be a breach of promise unless the defendant hath notice given him before the marriage: also, the payment ought to be after request, and the day of request ought to be mentioned, for *licet sæpius requisitus* will not serve: and it appears not that the request was after marriage; for request before will not serve.

HUTTON, HARVEY, and YELVERTON, *Justices*, conceived it was good enough: for the defendant at his peril ought to take notice, and the plaintiff need not shew that he gave notice of the marriage (a); and *postea requisitus* sufficeth (b) without shewing the day of the request.

But I doubted thereof; for a precedent was cited of one *Morse* (c) in the king's bench, where for not alledging notice the judgment was reversed.

But, notwithstanding this exception, judgment was given for the plaintiff.

(a) Cro. Jac. 102. 228. 405. 432. 1. Sid. 36. 5. Com. Dig. 52. 54. Yelv. 168. Cro. Eliz. 64. 1. Term (c) Cro. Eliz. 73. 218. Cro. Jac. Rep. 690. 3. Term Rep. 374. 183 523. Yelv. 66. Hutton, 2. 4. (b) Cro. Jac. 183. Polt. 139. 385. Leon. 2. Winch. 2.

### Lacon against Barnard, Attorney.

CASE 9.

Hilary Term, 20. Jac. 1. Roll 850.

**T**ROVER AND CONVERSION of one hundred sheep, A recovery in shewing that the plaintiff upon the twenty-fifth day of *March*, *trespass* for taking and driving away a flock of sheep, and small damages given, 19. Jac. 1. was possessed of those goods and lost them, and that upon the last day of *April* they came to the defendant's hands, who the same day sold and converted them to his proper use.

The defendant for eleven of them pleaded *not guilty*; and as to the eighty-nine, the residue, he pleaded, that the plaintiff at another time, *viz.* on the eighteenth day of *September*, 19 Jac. 1. prosecuted an original writ out of the chancery, returnable in this court, against the defendant and one *Brian Smith*, *quare ceperunt et abduxerunt* 100 *oves*; and thereto they appeared, and the plaintiff counted against them of their taking of a hundred sheep upon the fourteenth day of *April*, 19. Jac. 1.; and thereto they pleaded not guilty for the eleven sheep, and for the eighty-nine residue they pleaded a recovery in debt by the defendant against *Edward Hatcliff* of a debt of sixty pounds; and that the said *Edward Hatcliff* was then possessed of the said eighty-nine sheep, and that by virtue of a *feri facias* those goods were sold to him, whereupon he took them into his custody. The plaintiff thereto replied, and took issue, and found for him, and damages assessed to twopence: and thereupon the plaintiff had judgment of the said twopence damages, and had six pounds for costs; and avers, that the said taking and driving, for which the recovery in *trespass* was had, and the conversion of the said eighty-nine sheep in this action be all one, and that the said judgment is yet in force.

To this plea the plaintiff replies, that true it is he brought such an action, and recovered the twopence for the taking and driving of the said eighty-nine sheep, and six pounds for costs; but he farther saith, that the said twopence damages was not assessed for the value.

is no bar to *trover* for the same sheep, if the plaintiff reply that the recovery was only for the taking and not for the value.

S. C. Hutt. 81. Styles, 201. Cro. Jac. 73. Raym. 472. Win. Ent. 61. 3. Lev. 125. 1. Com Dig. 112. 4. Bac. Ab. 117. Dougl. 112. 3. Term Rep. 292.

LACON  
against  
BARNARD.

value of the said sheep and the conversion of them, and that the said defendant, at the day and year in the bill, sold the said eighty-nine sheep and converted them to his own use: the which conversion is the same conversion whereof he now complaineth; and traverseth, that the said taking and driving in the said action, whereupon the judgment was given, is the same trespass as to the conversion of those goods whereof the plaintiff now declareth.

Upon this replication the defendant demurred generally: and it was now argued at the bar by SERJEANT CREW, *for the defendant*, and by SERJEANT HENDEN, *for the plaintiff*; and after the said arguments at the bar, it was resolved

Post. 90.

3. Levinz, 124.

By HUTTON, HARVEY, and MYSELF, that this replication is good, and that the plaintiff ought to recover; for the damages of twopence given for the eighty-nine sheep being so small, is in itself an implication (and the Court shall so intend it) that it was given only for the taking and driving of them, and that the plaintiff had them again, and not in lieu of the value of them; for if it should be given for the value of them, then the plaintiff should thereby lose the property in them, and have nothing for his sheep but twopence, and the defendant should have the sheep: but the law will rather intend (and so it may be averred) that those damages were given only for the taking and driving, and that the plaintiff had them again, and afterwards lost them, and that the defendant found and after converted them, &c.: and this demurrer is a confession that he converted them after the said taking and driving; for the *action of trespass* is supposed to be upon the 14th April, 19. Jac. I. and the *trover and conversion* in this action is supposed to be upon the 30th April, 19. Jac. I. which well stands with the former action; for the defendant may take and chase them one day, and the plaintiff recover damages for the chasing, and after lose them, &c. And this first action is brought for the first taking and chasing, and the second for the conversion, so both may stand together, which is now confessed by the demurrer, and that the damages were given for the first taking and driving and not for the conversion; therefore they conceived the plaintiff should recover.

Vide 11. Rich. 2.

tit. Trespas, 207.

40. Edw. 3. f. 27.

46. Edw. 3. f. 18.

14. Hen. 7. f. 12.

44. Edw. 3. f. 2.

But YELVERTON held, Because the action of trespass is *cepit et abduxit*, therefore it includes that the defendant had them, and *ousted* the plaintiff of the possession: and although the damages be small, it shall be intended to be given for the sheep; and if so, then he cannot have an action for converting them afterward. But judgment was given for the plaintiff.



## Trinity Term,

2. Car. 1. In the Common Pleas.

Sir Richard Hutton, *Knt. Chief Justice.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

{ *Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Crips against Gryfil.

CASE 1.

Trinity Term, 1. Car. 1. Roll 1932.

**EJECTMENT** of lands in *Leighton-Buffard* of the demise of *A* devise of *Robert Key*. Upon a special verdict the case was, That *John Gryfil*, father of the defendant, was seised in fee of the said lands, and upon the 10th *October*, 16. *Jac.* 1. by indenture of feoffment mortgaged them to *Peter Key* and his heirs, upon condition, that if he or his heirs paid to *Peter Key* and his heirs one hundred and sixty pounds upon the 20th *October* 1624, he might re-enter. That afterwards, upon the 30th *March* 1619, the said *Peter Key*, by his will in writing, gave to *Robert Key* "all his goods, monies, bills or bonds, mortgages or specialties for monies," and made him his executor, and died; and that the one hundred and sixty pounds not being paid, *Robert Key* entered and let to the plaintiff.—And, without argument, the opinion of THE COURT was, that these words "all my mortgages" made a good devise of the lands mortgaged. Whereupon judgment was given for the plaintiff.

all my mort-  
gages" con-  
veys lands in  
fee mortgaged  
to the testator,  
although open  
to the equity of  
redemption;  
and the devisee  
may enter on  
non-payment.  
Post. 447. 450.  
Moor, 59.  
2. Vernon, 621.  
1. Ch. Rep. 33.  
Powell, 132.  
Cowp. 94. 657.  
660.

Dougl. 759. 763. 3. Term Rep. 356.

NOTE. This mortgage was not forfeited at the time of making the will. *L. C. B. PARKER'S MSS.*

### Reymund against Hundred of Oking.

CASE 2.

**ACTION** upon the statute of *Winton*. Whereas one *Palmer*, the master of a the plaintiff's servant, was robbed within the said hundred of servant robbed sixty-eight pounds of the plaintiff's money by persons unknown, and may maintain had made HUE AND CRY according to the statute, and none of the an action in his own name on. thieves were taken; and the said *Palmer* had made oath before such a the statute of justice of peace of the said county next adjoining to the said hundred *Winton*; but the within twenty days before this action brought, that he did not know the servant must be sworn pursuant any of the parties who robbed him, and that the said hundred had not to 27. *Eliz.* made him any recompence. c. 13.

Upon not guilty pleaded, and tried at the bar this Term, and Post 336. pound for the plaintiff, it was moved in arrest of judgment, that 2. Salk. 613. his action lies not, because the plaintiff himself was not sworn that Comb 263. he knew not any of the parties who did the robbery: for it is not 4. Mod 303. sufficient that the servant who was robbed was sworn; for by the 12. Mod. 54. Styles, 156. Latch. 127.

10. *Eliz.* 142. Leon. 323. 3. Mod. 228. Shower, 94. Carth. 145. Holt, 460. 3. Com. Dig. 15. 476.

CRO. CAR.

D

statute

REYMOND  
against  
HUNDRED of  
OKING.

statute of 27. *Eliz.* c. 13. the party who brings the action ought to make the oath: and it was argued, that the servant who was robbed ought to have brought the action, and then his oath would have been sufficient; but when the master brings the action, he himself ought to be sworn that he knew not any of the robbers, otherwise he might not bring it, and therefore the action lies not.

Post 336.  
Cro. Jac. 224.  
Cro. Eliz. 142.

But it was resolved by THE COURT, that the action well lies for the master, and that the servant's oath was sufficient; for it is properly in his notice that he was robbed, and did not know any of the robbers, and the master knows not that he was robbed, or who were the persons, but by report of his servant; and it would be inconvenient if the master should not bring the action, but the servant only, for the servant might release or compound, or discontinue the suit, and so the master shall have the loss by his falsehood; therefore the master shall bring the action, and have his servant who was robbed be his witness; whereupon it was adjudged for the plaintiff.—SEE *Co. Ent.* where such action is brought by the master, and the servant sworn.

See 8. Geo. 2. c. 16.

#### CASE 3

#### Sir Robert Banister's Case.

The lessee of  
tithes may  
maintain an  
action of debt  
for not setting  
them out.

1. Roll Rep.  
171. 361.  
Co. Lit. 301. b.  
1 Roll. Ab 481.

**D**EBT for not setting out of tithes. Upon a special verdict the case was, A parson made a lease of his rectory 9. *Eliz.* for sixty years, which was confirmed by the succeeding bishop and succeeding patron, neither of them being bishop or patron at the time of the lease.—Resolved *PER TOTAM CURIAM*, that it was good, according to the opinion in *Newcomen's Case*, 5. *Co.* 15. And so without argument it was adjudged for the plaintiff.

3. *Eulst.* 238.

#### CASE 4.

#### Aylesworth against Chadwell.

*In the Exchequer Chamber.*

A clerical mis-  
prison in judi-  
cial process is  
amendable.

Post. 90.  
Dyer, 129.  
Yelv. 64.  
Cro. Jac. 64.  
8. *Co.* 161.  
1. *Com. Dig.*  
316.

1. *Bac. Ab.* 100.  
1. *Bac. Ab.* 273.  
*Cowp.* 407. 425.

1. *Dougl.* 115. 136. 1. *Term Rep.* 782. 3. *Term Rep.* 349. 657.

**E**RROR of a judgment in debt, upon an obligation in the king's bench.

THE FIRST ERROR assigned was, That the parties being at issue, the awarding of the roll was of a *venire facias* returnable *die Martis post Crastin. Purificationis*. And the *venire facias* was made returnable *die Sabbati post Octabis Purificationis*.

THE SECOND ERROR was, That the *venire facias* did bear date the twelfth day of February, and was returnable *die Sabbati post octabis Purificationis*, which is before the *teste*.

*Sed non allocatur*: for being a judicial process, and the fault of the clerk, it shall be amended; and thereupon judgment was affirmed.

#### CASE 5.

#### Browne against Taylor.

*Hilary Term, 22. Jac. 1. Roll 1669.*

A. being seised  
of tenements  
holden by

**E**JECTMENT of a lease of Sir John Savil and others of land in Stapleton. Upon not guilty pleaded, it was found for the knight's service, ENFEOFFS certain persons to the use of himself for life, and after his decease to the use of such person or persons as he should appoint by his will, for such interests as in his said will should be specified; and DEVISES a certain term to all his tenants to commence after his decease, that A. B. should have the rents out of his land for life; and that his wife should have all the lands for her life. The wife shall take the land by the immediate devise, and not by the declaration of

BROWNE  
against  
TAYLOR.

parts for the defendant, and a special verdict for a third part, that one *Holgate* was seised of these tenements holden by KNIGHT'S SERVICE; and in 21. Jac. 1. infeoffed *Spencer* and others to "the use of himself for life, and after his decease to the use of such person or persons as he should appoint by his will, for such interests or otherwise as in his said will should be specified." Afterwards he makes his will in writing, and thereby deviseth that all his tenants of his farms shall enjoy their tenements for twenty-one years after his decease, and that *R. T.* shall have the rent out of his land for his life, payable at two Feasts of the year; and deviseth to his wife "ALL his lands in *Stapleton* for her life."

The question was, Whether this is a good declaration of the uses to limit it to his wife, and that she shall take it by the feoffment; or whether by the immediate devise (and then the devise is void for a third part, because the lands are holden IN CAPITE)?

After argument at the bar, without any at the bench, HUTTON, HARVEY, and YELVERTON agreed, that they should take by the devise, and not by declaration of the uses: FOR THEY HELD, that after the feoffment in this manner he hath a qualified fee in him as owner, so as he may make his will of those lands and devise the rent as owner thereof; and then the land being held by KNIGHT'S SERVICE (a), the devise is void for a third part: or he may declare his will, as upon the feoffment, which shall inure as a declaration of the uses upon the feoffment; and then all the land passeth: so that here, when he makes his will, without reference to the feoffment, the law will construe it as the will of one who is owner, and may dispose of it as owner, and not as a declaration of the uses, which is an authority only. Also the will appoints rents to be paid, which is a good will and devise, but the authority limits him, that he may not appoint any rents to be paid: and to have it to be a will for one part, and to dispose as by authority for another part, cannot be good in law; therefore it shall be adjudged as a will to enure for both.

But I doubted thereof, and conceived it might be well construed as a declaration; and thereby it shall be a good limitation for all the lands; and that by the said authority he might dispose of the rent out of the land; and his declaring that his tenants shall hold their farms for twenty-one years after his decease cannot be but by declaration; and it is more for the advantage of the parties that it should be so construed; and the law shall expound for the greatest benefit of the parties, when any construction it may be: and by this means all the parts of the will may take effect.

But THE OTHER THREE JUSTICES held, that he could not dispose of the rent, by reason of the said words, but of the estate of the land only. Whereupon, without any argument, they adjudged for the plaintiff.

Co Lit. 271. b.  
6. Co. 18. a.  
Mr. Hargrave's  
Co. Lit. 12. b.  
note (2), and  
III. note (1).  
Cro. Eliz. 877.  
Cro. Jac. 31.  
Moor, 367.  
10. Co. 143.  
2 Roll. Ab. 263.  
Jones, 392.  
1. Vent. 225.  
1. Atk. 559.  
Hard. 395.  
1. Ch. Caf. 103.  
1. Lev. 150.  
Powel on  
Powers, 124.  
3. Term Rep.  
665.

See 6. Co. 17.  
& 18. Cleere's  
Case, and  
10. Co. 35.  
Lovie's Case.

(a) See 12. Car. 2. c. 24.



# Michaelmas Term,

2. Car. 1. In the Common Pleas.

Sir Richard Hutton, *Knt. Chief Justice.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

CASE 1.

Love against Playter.

Easter Term, 2. Car. 1. Roll 386.

Q. If an action  
can be main-  
tained for cal-  
ling an attorney  
dishonest, without  
alleging it to be  
in his practice.  
Ante, 192.  
Moor, 61.

**A**CTION FOR WORDS. Whereas the plaintiff is, and had been an attorney of the common pleas for thirty years, That the defendant to deprave him spake these words, "Thou art the dishonestest attorney in England, and if any be more dishonest than thou art he deserves to be hanged." After verdict, upon not guilty pleaded, it was found for the plaintiff; and now moved in arrest of judgment, that these words are not actionable, because he doth not say that he was dishonest in his practice as attorney; and it may be in other matters: also, he doth not aver that there were any dishonest attorneys in England; and the Court shall not intend it, without shewing thereof. And a precedent was cited of *Walter v. Brown*, "Thou art as very a thief as any is in England;" and he did not aver that there was any thief in England; and no judgment was there given for the plaintiff: whereupon THE COURT would further advise; but there was no judgment given herein, for the parties agreed.

CASE 2.

Windsor against the Inhabitants of Farnham.

In the Court of Chancery.

A decree in  
chancery made  
pursuant to the  
directions of an  
act of parlia-  
ment, cannot,  
like other de-  
crees, be re-ex-  
amined upon a  
bill of review.

Jones, 147.  
N. R. 38.  
Poll. 157.  
R. N. 195.  
Bac. Ord. 1, 2.  
1. Ark. 534.  
2. Ark. 535.  
2. Peere Will.  
281.  
2. Freeman. 38.  
1. Vern. 135.  
Hinde, 56 to 66.  
Hinde's Chancery, p. 169.

**N**OTE. Upon a reference out of the chancery betwixt Thomas Windsor and the inhabitants of Farnham to SIR RANDOLPH CREW, *Chief Justice*, SIR JOHN WALTER, *Chief Baron*, SIR WILLIAM JONES, and to MYSELF, the sole question being, Whether a decree made by commissioners upon the 43. Eliz. c. 4. of charitable uses, and exceptions put in against it in chancery, and there examined, heard, and confirmed in part and altered in part, may now be re-examined upon bill of review, as other bills of review, upon decrees in chancery.—And IT WAS RESOLVED by all of us, that this bill of review is not allowable, but the decree in chancery is conclusive, and not to be further examined, because it takes its authority by the act of parliament; and the act doth mention but one examination; and it is not to be resembled to the case where a decree is made by the chancellor by his ordinary authority.—And JONES said, that so it is upon a decree made upon the statute of 37. Hen. 8. c. . by the major part, and confirmed by the chancellor, which is not re-examinable: and so those opinions were certified in chancery.

Misford's Pleadings, 78, 79. 4. Vin. Abr. 414. And see Williams's edition of Harri-

## Tutter against the Inhabitants of Dacorum.

CASE 3.

Trinity Term, 2. Car. 1. Roll 1717.

**A**CTION upon the statutes of *Winton* and 27. *Eliz.* c. 13. of hue and cry, alledging the robbery to be committed at *Shelby and Ridge*, in *divisis hundredorum de Dacorum et Cashio*, in the county of *Hertford*, and that he made hue and cry, and gave notice of the robbery at *South Mims*, within the county of *Middlesex*, near the hundreds aforesaid, and shews all other circumstances according to the statutes. The defendants plead not guilty; and found against them.

And now moved in arrest of judgment, that this declaration is not good; for he alledgeth the notice to be given at *South Mims*, within the county of *Middlesex*, which is in another county from that where the robbery was committed: and he doth not say *prope locum ubi roberia facta fuit*, but *prope hundredorum*, which may be ten miles from the place where the robbery was done: and then it is not according to the 27. *Eliz.* c. 13. which appoints it to be given near the place where the robbery was done: and divers precedents were shewn to that purpose (a). And likewise the words of the statute of 27. *Eliz.* c. 13. were insisted upon, "That none shall have actions upon those statutes except the said persons so robbed, with as much convenient speed as may be, give notice of the robbery to some of the inhabitants of some town, village, or hamlet, near the place where any such robbery shall be committed:" and so, not being alledged that notice was given to the inhabitants near the place where the robbery was committed, it was said not to be good.

But on the other side it was urged, that the allegation that notice was given to the inhabitants in a village out of the county is clearly good, being near the place where the robbery was committed, for a stranger cannot know the division of the counties; and so it hath been ruled here: and the allegation that *South Mims* is near the hundred is good enough, and may be well intended in the division where the robbery was done; especially it being after verdict, and that the jury would not have found the defendants guilty unless it had been so proved. And a precedent was cited (b), where an action was brought against the hundreds of *Langtree* and *Crawthorn*, and the robbery was alledged to be at *Torlton*, in *divisis hundredorum prædictorum*, and notice and hue and cry were alledged to be at *Cirencester*, in the division of the hundred aforesaid; and the plaintiff after verdict had judgment.

And ALL THE COURT, upon view of that precedent, conceived the declaration to be good enough, and that the hue and cry being alledged to be made out of the county was not material, being near the place where the robbery was done; which place being alledged to be near the division of the hundred aforesaid, shall be intended near the division of the hundreds where the robbery was done, and not at the most remote place thereof; for that should be a foreign

(a) Trinity Term, 30. *Eliz.* Roll 1425.  
and Hilary Term, 36. *Eliz.* Roll 505.

(b) 5. Jac. 1. New Bk. Ent. p. 343.

intend-

TUTTER  
against  
INHABITANTS  
of DACORUM.

(7) Cro. Jac.  
675.

intendment, but it shall be good either way; and the best course is to alledge it to be at the place where the robbery was committed, or at the village near the place thereunto: but *prope divisis* shall be so intended, especially after verdict. Wherefore it was adjudged for the plaintiff.—In the case of *Foster v. the Hundred of Spelthorn* (a), supposing the robbery to be made at *Bodfom*, *PROPE divisis hundredorum prædictorum*, and alledges the *hue and cry* was made, and notice given to the inhabitants of *Hatton*, *PROPE divisis hundredorum prædictorum*; and yet adjudged for the plaintiff.

See 8. Geo. 2. c. 16. for other forms of proceeding upon hue and cry.

#### CASE 4.

#### Rowden against Maltster.

Trinity Term, 18. Jac. 1. Roll 1051.

If a copyhold be surrendered to the use of a last will and devised to A. in tail, who, after issue born, surrenders to his wife for life, and there is no custom to entail such estate, A. shall take a fee conditional; and the surrender to his wife is good, the condition being performed by the birth of issue.

S. C. Godb. 367.

1. Roll. Ab. 838.

Co. Lit. 60.

note (3).

2. Saund. 422.

3. Lev. 327.

Atk. 385 to 390.

2 Atk. 37. 45.

85. 101. 189.

2. Vezey, 603.

Co. Copyh. sec.

47, 48, 49.

3. Co. 8.

2. Bl. Rep. 946.

TRESPASS for entering into lands in *Meneuden*.

Upon not guilty pleaded, a special verdict was found, That *George Sterling*, a copyholder in fee of the manor of *Meneuden*, in 39. *Eliz.* surrendered it into the hands of two of the tenants of the said manor, to the use of his will, and had issue two sons, *John* and *Henry*, and devised the said copyhold land to *John* and the heirs male of his body, the remainder to *Henry* and the heirs male of his body, with remainder over; and afterward died. This surrender was afterward, in 41. *Eliz.* presented by the homage, and *John* the eldest son admitted thereto, *habendum* to him and his heirs. Afterwards *John* had issue three sons, and surrendered the same to the use of his will, and thereby devised it to *Katharine* his wife for her life, and dies; and in 43. *Eliz.* the surrender was presented, and she admitted; afterwards the three sons of the said *John* died without issue: and they further find, that no copyholder may surrender or devise his copyhold lands in tail: and that afterwards the said *Katharine* married *J. S.* who let to the plaintiff for a year, who entered accordingly, and the defendant, by the command of *Henry*, ousted him. *Et si super totam materiam, &c.*

The sole question was, When a copyholder in fee surrenders to the use of one in tail, there being no custom to warrant such an entail, whether it be an estate tail by the statute of Westm. 2. *de donis conditionalibus*, or a fee simple conditional at the common law? It was argued at the bar, and after solemnly at the bench, because it was a general cause, and might concern divers copyholds.

2 Bl. Com. 113. Burr. 206. 979. 1. Wilf. 26. Strange, 1197.

Copyholds are included within the general words of a statute, "lands, tenements, and hereditaments," when no prejudice thereby ensues to the lord.

3. Co. 8. 3. Lev. 327. Savil, 67. Dalison, 16. 2. Inst. 343. Carth. 23. 2. Com. Dig. 527.

YELVERTON, the puisne Justice, held, that it was an estate tail by the equity and intent of the statute *de donis conditionalibus*, although it were not within the express words thereof; for in all statutes made for the good of the commonwealth, and wherein no prejudice accrues to the lord or tenants, by reason of the alteration of any

interest,



ROWDEN  
against  
MALTESTER.

interest, service, tenure, or custom of the manor, there the general words of such acts of parliament do extend to copyhold lands (a); as the statute of *Merton*, c. 1. which gives damages to a  *feme covert*  upon a recovery in a writ of dower where the *baron* died seised, extends to copyholds: and the statute of *Westminster* 2. c. 3. and the three several branches of that statute; the one, which giveth the *cui in vita* upon a discontinuance made by the husband; the second, which giveth the receipt to the wife upon her husband's refusal to defend the wife's title; and the third, which giveth a *quod ei de forceat* to particular tenants, extend to copyholds: and the statute of 32. *Hen.* 8. c. 9. against champerty and buying of litigious titles, 4. Co. 26. a. and 32. *Hen.* 8. c. 28. which giveth an entry in lieu of a *cui in vita*, extendeth to copyholds, because these statutes are beneficial to the commonwealth, and not at all prejudicial to the lord in the alteration of tenure, estate, services, &c.; as the case cited in 4. Co. 26. & 30. proves (b), and from whence he inferred the same conclusion, that the statute *de donis conditionalibus* being made for the general good of all, and the extending it to copyholds was no way prejudicial either to the lord or tenants, and therefore they are to be intended within the equity and meaning thereof: otherwise A FORMEDON IN DESCENDER would not lie of a copyhold, which none can have but tenant in tail; and a remainder limited upon such an estate hath been allowed, and therefore is no fee conditional; for neither upon a fee absolute or conditional can a remainder in tail by any means depend. And as to that objection that a copyholder in fee cannot hold of the donor, but must hold of the lord, he said, that he might well hold of the donor, as 11. Co. *Sir Henry Nevill's Case*, 17. b. where we find that a manor was held by copy of court roll, and had other copyholds under it to hold thereof; and by the same reason tenant in tail of a copyhold may hold of his donor, and he shall hold over of his lord. And as to the objection which was made, that if an estate tail should be allowed in copyholds, there would be a perpetuity maintained, so as it could not be cut off; he said, it might be cut off by a recovery in the court of the manor, as the YEAR-BOOKS are in 23. *Hen.* 8. BROOK "*Recovery in Debt*" 27. and 19. *Hen.* 6. pl. 64. and 26. *Hen.* 6. pl. 6. and *Plowd.* 59. And he said, he knew no reason but a copyhold might as well be intailed as titles of honour, which concern the person of a man, or a villein, or liberty of franchise; and if copyholds might not be intailed, it would deprive them of one of those privileges which any man who hath an inheritance ought to have, *viz.* where a gift is to him and the heirs female of his body, if he hath a son, his daughters shall not inherit: and for that he vouched 37. *Hen.* 8. "*Done*," 61. and said, there were many precedents and authorities that copyholds might be intailed; and cited *Litt. fol.* 16. f. 76. *Plowd. Manxell's Case*, fol. 2. 15. *Hen.* 8. "*Tenant in Tail by copy of court roll*," 24. et anno 3. *Mariae, Dyer*, 192. and the *Old Book of Entries*, 129. where are two precedents, the one in 3. *Hen.* 8. the other in 29. *Hen.* 8.

(a) 2. Inst. 343. 3. Co. 9. a. 3. Lev. 316. *Strange*, 253. 258. *Gilb. Ten.* 164. (b) Copyholds are within the statute of limitations. *Moor*, 410. *Id. Raym.* 78. 132. *Strange*, 253. 258.

But

Copyholds are not within the general words of a statute that alters the service, tenure, custom, or interest of the land; and therefore a jointure made of copyhold lands is no bar to dower within the statute 27. Hen. 8. c. 10.

3. Inst. 397.  
3. Co. 9. a.

Ante. 24, 25.  
Cro. Jac. 305.

But on the contrary it was argued by the three other justices, HUTTON, HARVEY, and MYSELF, that this was not an estate tail by THE STATUTE OF WESTMINSTER THE SECOND, *de donis conditionalibus*, but a fee simple conditional at the common law, and then the plaintiff hath a good title; and that the surrender to the use of his wife for life being after issue had, shall give to her an estate for life, and is good as well against the donor as his issue: for when an act of parliament altereth the service, custom, tenure, interest of the land, or other thing in prejudice of the lord or tenant, there the general words of such an act shall not extend to copyholds (a); as the statute *West. 2. c. 20.* which giveth the *elegit*, extendeth not to copyhold lands, because it would be prejudicial to the lord, and a breach of the custom, that any stranger should have interest in the lands holden by copy without the admittance and allowance of the lord. And the statute of 27. Hen. 8. c. 10. of uses, toucheth not copyhold (b), because the transmutation of possession, by the sole operation of the statute, without allowance of the lord, would tend to the lord's prejudice. And the statutes of 31. Hen. 8. c. 1. and 32. Hen. 8. c. 32. whereby *jointenants and tenants in common* are compellable to make partition, extend not to copyholds (c). And the statute 32. Hen. 8. c. 28. which confirmeth leases for twenty-one years made by tenants in tail, or by the husband and wife, of the lands of the wife, touch not copyhold lands (d), for that statute warrants only the leasing of such lands as are grantable by deed; but such are not copyhold lands; for though by the lord's licence they may be demised by indenture, yet in their own nature they are demisable only by copy, and therefore out of the general purview of that statute. And for the same reason the statute 32. Hen. 8. c. 34. which giveth an entry to the grantee of a reversion, upon the breach of a condition by the particular tenant, toucheth not copyhold. So here in this case we held, that the statute *West. 2. c. 1.* of entails, did not extend to copyholds, because it would be prejudicial to the lords: for by this means the tenure would be altered; for the donee in tail, without any special reservation, ought to hold of the donor by the same services that the donor holdeth over; and he who comes in by surrender and the admittance of the lord, to hold to him and the heirs of his body, cannot hold of him who surrendered, but shall hold of the lord, and is tenant at will unto him, and shall do the services to him as lord. *Vide 2. Edw. 4. pl. 6. 4. Hen. 6. pl. 17. 41. Edw. 3. pl. 45. & 45. Edw. 3. pl. 19.*

SECONDLY, We held, that in respect of the baseness of their estate, the statute never intended to provide remedy for them nor their alienations: for the words of the statute are, "*Quod voluntas donatoris in charta sua manifestè expressa de cætera observetur;*" which proveth, that the intent of the makers of the statute was, that no

Gilb. Ten. 165.

(a) 3. Co. 8. a. Moor, 128. Stra. 516.  
Id. Ray. 1066. Gilb. Ten. 164. Salk. 297.  
4. Mod. 83. 85 3. Bac. Abr. 322. Harg.  
Co. Lit. 187. a. note (2).

(b) 4. Mod. 84. Cowp. 709. Dougl. 716.  
(c) 3. Bac. Abr. 322  
(d) Co. Copy. 152. Co. Lit. 44. 6. Co.  
37. 3. Lev. 327.

hereditaments should be entailed within this statute, but such as either was or might be given by charter or deed: but copyholds are no such hereditaments, and therefore not within the meaning of that act; and for that were cited *Litt. fol. 16. 21. Hen. 6. pl. 37. 11. Hen. 4. pl. 8. 2. Hen. 4. pl. 12. 13. Rich. 2. "Faux Judgment," 7. 14. Hen. 4. pl. 34. 7. Edw. 4. pl. 19. 21. Edw. 4. pl. 50. 4. Co. 21.*

ROWDEN  
against  
MALTELL.

And WE ALSO HELD, that copyholds could not be entailed, because copyholders at the time of making the said statute, and for divers years after, were only tenants at will of the lord, and the lord might have ousted them, and they had no remedy unless in chancery.

Copyholds cannot be entailed by virtue of the statute *de donis* only; custom must co-operate with the statute.

Co. Lit. 60 a. b. 3. Co. 8. Carth. 22. Cro. Eliz. 307. 3. Lev. 327. 4. Mod. 86. 2. Atk. 101. 3. Term Rep. 470.

THIRDLY, If copyholds might be intailed, then the perpetuity of such estates must be maintained; for a fine cannot be levied of copyhold lands to bar the intail; nor can a recovery in value be intended of such an estate where warranty cannot be annexed to it: also many other mischiefs would ensue thereupon, as well to the lord as to the copyholders themselves; for then the tenants could not provide for their wives and children, nor make leases to others for years to bind their issue with the lord's licence: and lords would lose the wardship of their tenants in such manors where by custom they belong to them; and there would not be so often changes of tenants as before, whereby lords would lose their fines.

A fine cannot be levied of copyhold land to bar the entail.

3. Co. 8.  
9. Co. 105.  
Co. Lit. 60.

LASTLY, We held, that neither estate tail, nor estate tail after possibility of issue extinct (which hath a necessary dependence upon an estate tail), can by any particular custom be allowed (*a*); for no estate tail was before THE STATUTE DE DONIS, but all inheritances were either FREE SIMPLE *absolute or conditional*; and the statute being made 13. Edw. 1, which is within time of memory, no custom can have commencement since then; for then a custom might begin within time of memory, which is repugnant to the rules of custom: and in proof thereof were cited 34. Hen. 6. pl. 36. 4. Co. 87. 5. Co. 52. And in answer to the authorities vouched, we said, there were none which mentioned copyhold lands to be either within the words of the statute DE DONIS, or within the equity thereof, besides *Plowden*, in *Manxell's Case*: and that the general current of opinion in all our books is, that an estate in copyhold lands, limited to a man and the heirs of his body, is a fee simple conditional at the common law; and to *Littleton*, and the cases there cited, ought to be intended: and agreeable herunto are the resolutions in *Lord Coke*, 3. Rep. 1. *Heyden's Case*, and 9. Rep. 105. Whereupon it was adjudged for the plaintiff.

Neither an estate tail nor an estate after possibility, &c. can be created by custom.

Co. Lit. 60. b.  
Co. Cop. f. 48.  
Moor, 188. 358.  
637.  
1. Lev. 136.  
Raym. 164.  
Sid. 314.  
Cro. Eliz. 717.  
907.  
3. Co. 8.  
Lit. f. 73.  
1. Inst. 60.  
Carth. 23.  
Post. 83.



CASE 5. Richard Hodges, Administrator of Thomas Hodges against Thomas Moyse and John Scriven.

An action for an escape from an arrest by process out of an inferior court need not shew by what authority the inferior court was held; for in this case the style of the court is but inducement to the action.

Cro. Jac. 184.  
313. 532.  
8. Co. 133.  
Moor, 849.  
Co. Lit. 303.  
2. Vent. 100.  
Lut. 918.  
1. Lev. 85.  
1. Lev. 81.  
3. Lev. 243. 404.  
1. Show. 48.  
6. Mod. 72.  
1. Term Rep. 151.

**ACTION UPON THE CASE.** Whereas the plaintiff, in such a court of *pypowders* held at *Gloucester secundum consuetudinem civitatis illius*, brought an action of debt of two hundred pounds against *William Hodges*, and thereupon the said *William Hodges*, by due process of the said court, was arrested, and under custody of the defendants, sheriffs of *Gloucester*, according to the custom there, until he shall find bail: that they permitted him to go at large, so as he hath concealed himself, and not answered him his debt.— Upon not guilty pleaded, and found for the plaintiff, it was now moved in arrest of judgment, that this action lies not.

**FIRST,** Because it is not alledged that the court is there held at *Gloucester* by custom or charter, and then it is clear they hold court without authority, and their process idle, and the defendants not chargeable.

**SECONDLY,** Because a court of *pypowders* hath no authority to hold pleas but for contracts or batteries in markets and fairs, and not for debts: and to that purpose were cited 8. Co. 73. and 8. Co. 133. *Turnor's Case*.

**THIRDLY,** In pleading a recovery in an inferior court, it ought to shew by what authority the court is held, whether by patent or prescription; for otherwise they had no authority, and the recovery void.

And ALL THE JUDGES conceived, that the court being styled "a Court of *Pypowders*" (which is a court incident to fairs and markets, and for causes only arising within them), shall not be intended a court unless it be shewn to be held by charter or prescription; and that the sheriff, who is to take advantage thereby (he being an officer of the court and arresting the party), ought to shew it: as stewards when they make any certificates out of inferior courts, ought to shew therein how the said courts are holden, for they know best their own authority; and the omission thereof is just cause to reverse and annul all their proceedings: but otherwise it is in the case of a stranger, as here, where the style of the court is but an inducement to his action.

The *issue roll* may be amended in clerical mistakes by the *imparlance roll*, if it make no alteration in the *issue* or the *verdict*.

Post 92.

Cowp. 407. 425. Dougl. 115. 136. 377. 730. 1. Term Rep. 782. 3. Term Rep. 349. 749.

And these words, "*secundum consuetudinem civitatis*," being in the *imparlance roll*, THE COURT was of opinion, that the omission of them in the *issue roll*, whereupon the trial was had, was but *vitium clerici*, and might be amended: for the *imparlance roll* is the principal and guide to the other; and that the addition thereof would not alter either the *issue* or *verdict*. And accordingly it was amended and adjudged for the plaintiff. *Vide* 13. *Edw. 4. pl. 8.*

## Baldry against Packard.

CASE 6.

Trinity Term, 2. Car. 1. Roll 617.

**PROHIBITION.** Whereas the plaintiff sued him before the commissary of the bishop of *Norwich* for defamation, in which suit he had sentence, and six pounds assessed for costs; and the defendant appealed from the said sentence to the court of arches: that all this was depending in 1622; and by the general pardon, 21. *Jac.* 1. the offence of the defamatory words was pardoned, which was pleaded in the court of the arches, and that notwithstanding they proceeded in the appeal, where the first sentence was reversed; and in that suit sixteen pounds assessed for costs to the appellant, where by law they ought not to have proceeded, nor given any costs. A prohibition was prayed; and it was thereupon demurred.

And after argument at the bar, debated and resolved by THE COURT, that here was no cause of prohibition: for although the pardon hath discharged the offence of the defamation *quoad* any punishment, to be inflicted by way of penalty or otherwise, yet in respect of the costs in the first suit, which be not discharged by the pardon (being assessed before the day to which the pardon relates, as it is agreed in *Hall's Case* (a), if they be not duly assessed, the Court may well proceed in the appeal to discharge the party of them; and if they reverse the first sentence, so as it appears the costs were unduly taxed, and the party unjustly vexed, they may well in the appeal assess costs; for the pardon doth not extend to stop the suit commenced in the appeal; nor by reason of the pardon had they cause to surcease that suit: and although the costs in the appeal be assessed after the pardon, yet they are well assessed, the cause of those costs not being taken away by the pardon. Whereupon consultation was awarded; but HUTTON, *Justice*, doubted thereof: for the pardon discharging the offence (which is the principal), he conceived they ought not to have proceeded for the costs.

(a) 5 Co. 51. b.

## Gee, Bishop of Chichester, against Freedland.

CASE 7.

Easter Term, 1. Car. 1. Roll 607.

**REPLEVIN** upon a distress taken in *Allingland Park*. Upon demurrer the case was, *The Bishop of Chichester* was seised in fee of the said park, *jure episcopatus*, and had the office of parkership, which the bishop granted to the said *Freedland* for life, and also granted to him for the execution thereof an annual rent of 3l. 6s. 8d. *una cum liberatura* of 13s. 4d. by the year, together with pasturage for two horses in the said park yearly, and the windfalls in the park, with clause of distress for the said rent of 3l. 6s. 8d. and the livery of 13s. 4d. in all the possessions of the bishoprick in the said county, which was confirmed by the dean and chapter: and for non-payment of the said rent of 3l. 6s. 8d. the defendant took the distress; and avers the office and the fee of 3l. 6s. 8d. to be ancient, but doth not make any such averment for the residue.

A grant by a bishop, &c. of an ancient office with the antient fees only annexed, if confirmed by the dean and chapter, is not within 32. *Hen.* 8. c. . nor restrained by 1. *Eliz.* c. 19. or 13. *Eliz.* c. .; but he cannot grant a new office, nor add

new fees to old offices, except they be necessary; nor can they grant offices in any manner not warranted by usage. Ante, 16. Post, 557.—Bridg. 26. Ley. 71. 10. Co. 58. Pollexf. 134. 4. Mod. 16. Cro. Jac. 173. Ob. Lit 44.

The

GEE  
 against  
 FREEDLAND.  
 Post. 577.  
 Co. Lit. 44. a.  
 101 Co. 60.  
 2 Roll. Abr. 154  
 2. Lev. 138.  
 4 Mod. 16.  
 Carth. 213.  
 1. Burr. 219.  
 221.  
 3. Bac. Ab. 723.  
 Dougl. 573.  
 3. Com. Dig.  
 251.

The plaintiff in bar of the avowry confesseth the grant, and pleadeth the 1. Eliz. c. 19.; and that the said pasturage for two horses never was granted before; and that the bishop who made the grant thereof died, &c. and the plaintiff was elected bishop. Whereupon it was demurred.

The sole question was, Whether this grant of the office, with the ancient fee of 3l. 6s. 8d. confirmed by the dean and chapter, be good to bind the successor, notwithstanding the 1. Eliz. c. 19. or void only for the things added in the grant; or if the addition of those new things shall make all the grant void against the successor?

After argument at the bar, it was argued at the bench, and held by HUTTON and YELVERTON, Justices, that the grant was good for the office and the ancient fee of 3l. 6s. 8d. being in a several grant by itself, and not conjoined or mixed with the other grants, and then the one may be good and the other void; but if the grant had been of the fee of 5l. where the other fee was only 3l. 6s. 8d. because it is entire in the grant, it would have been void for all: but here the grant for the rent is one by itself, and the grant of the pasturage is another, and distinct by itself, and the one doth not depend upon the other; so it may be good for one and void for the other: and although the grant for the pasturage is void against the successor, yet the rent may be good.

And HUTTON said, that if the bishop had granted the office and rent for him and his successors, and had granted the pasturage only during the time that he should continue bishop, and so had distinguished them in his grant, there had been no question, but both had been good: and as he by his express limitation might have limited them, and they should have been good; so the law shall make construction that the one is good against the bishop himself, the other against the bishop and his successor: and the one being ill and void against the successor, shall not destroy that which is good; for *utile per inutile non vitiatur*: and although the office itself is not within the words of the 1. Eliz. c. 19. yet it is within the equity thereof. The offices of parkership and stewardship, and other offices which are of necessary use for the bishop, are admitted and allowed to be grantable, although they be new offices and new fees, if they be reasonable (and of the necessity of them, and of the reasonableness of the fees, the Court shall adjudge): and therefore in Hilary 10. Jac. 1. Rot. 758. in C. B. in the case of *The Bishop of Ely* (a), where the bishop of Ely, the 20th April, 1. Eliz. (which was presently after the statute), granted the office of the keeping of his house and garden, with the fee of 3l. *per annum*, to another for his life, which was afterwards confirmed by the dean and chapter.—Although there was not before any such office, yet being a necessary office, and the fee reasonable, it was adjudged good against the successor, and not restrained by the 1. Eliz. c. 19. And although it hath been objected, that the livery or fee of 13s. 4d. and the wind-falls be not averred to be ancient, yet HUTTON conceived it shall be intended they were ancient, when the contrary is not averred;

Dyer, 85.  
 10. Co. 61. b.

(a) Ley, 78. Moor, 28. 2. Brownl. 137. Burr. 222.



especially when nothing is alledged on the other part to be new but the pasturage. And the avowant distraining only for the 3l. 6s. 8d. needed not to aver any other to be ancient than the rent which was in question: and if one grant had been of that office and ancient fee of 3l. 6s. 8d. another grant *pro meliore exercitio ejusdem officii* (and for his better maintenance) of the livery, 13s. 4d. and the pasturage and windfalls; these being by such several grants, the first should be good, being distinct by itself, and the other should be void; so by construction of the law it shall be taken here as several grants, rather than the grant shall be destroyed.

SEE  
against  
FREEDLAND.

Post. 61. 280.  
Dyer, 370.  
3. Bac. Abr.  
353.

But YELVERTON agreed, that if he had granted the office for life, and had further granted for the executing thereof these fees following, *viz.* the rent of 3l. 6s. 8d. the livery or 13s. 4d. the pasturage and windfalls; and so put together the ancient rent and new addition, the grant should be void in all, because they be all in one sentence: but here being in several sentences, the one not depending upon the other, it may be good for the one, and void for the other against the successor. Whereupon they concluded judgment ought to be given for the avowant.

But it was argued by HARVEY and MYSELF, that judgment ought to be given for the plaintiff: for it is agreed on all parts that the 1. Eliz. c. 19. was made for the benefit of the successor, that his possessions might not be charged to impoverish him; wherefore all estates and grants which are to the prejudice of the successors are void. And true it is, that grants of ancient offices, with their ancient fees, which are confirmed by the dean and chapter, are made good by the intention and equity of the statute: and that they shall have officers reasonable, with reasonable fees, although they be not warranted by the words of the statute, it being within the purview, intent, and meaning thereof, as 10. Ca. 61. *The Bishop of Sarum's Case*; which is the reason that a grant of rent or annuity *pro consilio impendendo* is restrained by the intent of the statute, although it be not within the words, because the successor is thereby impoverished and prejudiced, as by the books of 22. Eliz. Dyer, 370. 10. Ca. 60. *The Bishop of Salisbury's Case*, the *Case of Bolton* there cited, and 5. Co. 15.; and that grants of ancient offices are taken to be within the intent of the statute, and are to be allowed, appears, because in another statute, made the same parliament of 1. Eliz. c. 4. ancient offices are coupled with leases reserving the ancient rent made by the bishop. But although grants of ancient offices may be allowed for necessity, yet they ought not to be with a new addition of a new charge upon the successor to impoverish him; and therefore it ought to be granted as usually it had been, and not otherwise: for it is at his peril who takes such a grant, that he doth not take a new addition or alteration; and therefore if an office usually granted for one life be granted for two lives, or if it be granted for life, reversion for life, and confirmed by the dean and chapter, it is void against the successor, as well for the first life

Post. 259.

GEE  
against  
FREEDLAND.

Co. Lit. 44. b.  
8. Co. 37.

Co. Lit. 303. b.  
5. Co. 59.

as for the second (a), because it is not granted according to the usual course : and although one of the tenants holds it during the life of the bishop who granted it, yet not being good at the time of the grant, the subsequent act shall not help it; so this addition of the new charge makes the grant void, as in the *Lord Montjoy's Case*, 5. Co. 4. Lease for years of land usually demised, and of other land not demised before, reserving the ancient rent for the land formerly leased, and twelpence for the land not usually let, which was the full value; yet it was resolved that the lease was not good, by reason of that addition. And although it hath been said that the livery and pasturage are distinct clauses, from the first grant of the rent, and not depending upon nor conjoined with it, so that the rent may stand, and for the other it shall be void; it was answered, that it appears fully they be one entire grant, and not several: for the rent is granted *una cum liberatura, or thirteen shillings fourpence, et una cum pasturagia*; which is a copulative, and one sentence. See *Year-Books* 8. Hen. 7. 4. and 38. Hen. 6. 34. in the *Abbes of Syon's Case*. And for the 13s. 4d. or livery, it is conjoined in one clause of distress, with the rent of 3l. 6s. 8d. so as they be but one grant, and upon one consideration; but if they had been in another clause, or that for another consideration, he had granted the said livery of 13s. 4d. and pasturage, then the grant might stand for the one, and be void for the other. And where it hath been objected that the livery and windfalls, although they have not been sufficiently averred to be the ancient fees, yet may well be so intended; forasmuch as the contrary is not shewn on the other side. It was answered, that the avowant (because he is to make his title) ought to aver the several things granted to be ancient fees to the office, otherwise the averring that the one is ancient doth imply that the other is not ancient; for a plea shall be taken most strong against him who pleadeth it: and in proof thereof see *Plowd.* 46. & 103. 1. Co. 46. and 5. Co. 9. *Brudenel's Case*: and it sufficeth the plaintiff to alledge that any of them is a new addition; and he needeth not to alledge the residue to be new, for then peradventure it would be double. Also, for the principal point in the case, the additions trench to the prejudice of the successors; and this statute hath been always construed to redress the mischief which was at the common law, upon grants confirmed by dean and chapters in charge, or to the prejudice of the successor, and to make them void; as appears 5. Co. 2. & 3. and in *Scambler v. Wats* (b), where two offices of steward or under-steward of a manor, usually granted severally, with several fees, were held void for both. Also to both offices the ancient fees are appendant, and parcel of them, and shall pass by grant of the office *cum pertinentiis*: but those fees newly added cannot be said appertaining, nor parcel, to be recovered by assize, as *Webb's Case* (c), and the Book of *Assize* (d) proves: therefore the grant, being of more than was anciently granted, was void. And to expound this grant of the office with new fees to be good for all during the time that the grantor is bishop, and to be afterwards good in part and void in part against the successor, and so to make

(a) Lamb's Case.  
(b) Cro. Eliz. 636.

(c) 8. Co. 49. b.  
(d) 39. Assize, 4.

fractions of grants, is against the exposition of grants, and against all former constructions and interpretations of this statute; and therefore they conceived, that this grant was void in all *ab initio quoad* the successor, and the plaintiff ought to have judgment.—Court divided (a).

GER  
against  
FREEDLAND.

(a) Bridg. 32. Ley. 71.

Robert and William Eyres *against* the Executrix of  
Christopher Eyres.

CASE 8.

*In Chancery.*

**I**N a suit in chancery this Case was made and referred to THE MASTER OF THE ROLLS, DODERIDGE, JONES, and MYSELF, *Justices*, and to SIR JOHN WARD and DOCTOR LEE, *Masters of the Chancery and Civilians*.

Christopher Eyres, the testator, 15. Jac. 1. made his will in writing, and thereby devised legacies to charitable uses, and to the plaintiffs Robert and William Eyres, his brothers; to the one, two hundred pounds; and to the other, one thousand pounds; and divers other legacies to his other kindred; and made his wife executrix, saving that he appointed his said two brothers to be conjoined with her, as executors in trust for his wife, for performance of his will. Afterwards, 22. Jac. 1. being sick, and sending for Mr. Dampart, parson of the parish, and for Mr. Stone, a reader of the Temple, they came, and demanded of him, What friend he thought best to be his executor, to take care of his funeral and see his will performed? and, Whether he trusted any person more than his wife? He answered, that his wife was the fittest person, and therefore should be his sole executrix. Being then moved by Mr. Stone to give legacies to his father, brethren, and kindred, he answered he would not give or leave them any thing, but he bequeathed to Lionell Atwood, his godson, twenty or thirty shillings; and being thereupon requested by his wife to give him a greater legacy, he answered her, "*Thou knowest not what thou doest; do not wrong thyself; thirty shillings is money in a poor body's purse.*" and for others he left them to his wife's discretion or disposition: and the testator did speak these words, or the like in effect, "*animo testandi et ultimam voluntatem declarandi.*" All this was set down in a codicil, and the first will and that codicil proved in *communi formâ* (b).

A testator on his sick-bed, being asked if he will give his brothers any thing, says, "*I will give them nothing;*" this does not revoke a former will which gave them legacies.

Cro Jac. 115.  
497.  
Cro. Eliz. 306.  
1. Roll. Abr.  
615.  
Moor, 874.  
Owen, 76.  
Godb. 33.  
1. Sid. 73.  
3. Com. Dig. 13.  
Powell on De-  
vices, 533.  
Cowper, 49.  
130.  
Douglass, 31. 39.  
241. 716, 717

Whether this codicil were a revocation of the first will for the legacies given to his two brothers, now plaintiffs? was the question.

After divers arguments, as well by the civilians as common lawyers, IT WAS RESOLVED by them all, and so certified under their hands, that they conceived it was not a revocation of the said legacies, but they did not certify their reasons. The principal rea-

(b) See stat. Frauds, 29. Car. 2. 3. c. 1. 5. which requires that a will shall be signed by the deviser, or by some person in his presence and by his express directions, and attested and subscribed, in the presence of the deviser, by three or four cre-

dible witnesses; and enacts, that no devise of lands shall be revoked but by writing; or any will of personal estate, by word of mouth, unless it is reduced into writing in the testator's life-time, and executed as the act dire.



R. & W. EYRES  
against  
The EXECU-  
TRIX of  
C. EYRES.

sons of their said resolutions were, Because there was an absolute and formal will made in his health, and there being no speech made by him of his former will, nor of the legacies thereby devised to his father, brothers, and kindred, nor that he seemed to remember his former will. That an answer to a doubtful question shall not take away the legacies devised before; for *non constat* what his intent was in using those words, for it may be his meaning was not to give more than he had given before, or that he could not give more at that time by that will; and *non constat* that he heard all the words when he was moved to give to his father, brethren, and kindred; and he answering, "I will not give them any thing," *non constat* what he intended by those words: and therefore upon such doubtful speeches to nullify a will advisedly made without clear or perspicuous revocation, or words which *tantamount*, shall not be permitted. Also the civilians affirmed, that there is an express canon, there cannot be a revocation of legacies among children without precise mentioning the first will and legacies given thereby to the children; and they said, the law is taken to be so when he hath not any children, and deviseth legacies to his brothers, and there doth not appear any cause of misdemeanor to provoke him to revoke his will, nor do his words import any such intention.—So upon these opinions THE LORD KEEPER, being assisted with THE MASTER OF THE ROLLS and the said THREE JUSTICES, decreed the said legacies to the brothers, the said codicil not having made any revocation of them.

## CASE 9.

## Memorandum.

CREW, C. J.  
discharged.  
Post. 65. 375.

UPON Friday, being the tenth day of November, SIR RANDOLPH CREW, *Chief Justice* of the king's bench, was discharged of that place by writ under the great seal, for some cause of displeasure conceived against him, but for what was not generally known (a).

(a) *Hume* says, he was discharged as the purposes of the court. 6. Vol. Hist. unfit for, and not sufficiently obsequious to Eng. p. 166.

## CASE 10.

## Powell and Wife against Plunket.

In the Exchequer Chamber.

In an action for saying "A. stole my plate," the defendant cannot justify that he spoke the words on a suspicion that A. was the thief.

Cro. Jac. 600.  
2. Elpin. Dig. 291.  
1. Term Rep. 410.

ERROR in the *exchequer chamber* of a judgment in the king's bench, in an action by *Plunket* for these words spoken by the wife: "Mr. *Plunket* did steal my plate out of my chamber." The defendants pleaded that they were possessed of such plate, which was stolen out of their chamber, and she, suspecting the plaintiff to have stolen it, spake those words; and it was demurred thereupon, and adjudged for the plaintiff.

This error was assigned, That the declaration was not good; for a *feme covert* cannot have plate, but it is the plate of her husband; so the words are insensible and not actionable.

But it was resolved by ALL THE JUSTICES AND BARONS, that the action well lies; for although she may not have plate, yet it is in

in common speech well known that the wife accounts her husband's goods her goods, and so what she intended by those words is a great slander, and the justification clearly ill; for suspicion is no good cause to justify the speaking such words. Whereupon the judgment was affirmed.

POWELL and  
WIFE  
against  
PLUNKET.

Morris against Fletcher.

CASE II.

In the Exchequer Chamber.

**E**RROR of a judgment in the king's bench in an *assumpsit*, where the plaintiff alledged, that in consideration he would marry the defendant's daughter, the defendant would pay for the wedding apparel; and the plaintiff alledged, that he married the defendant's daughter, and provided for her two gowns and two petticoats; and that the defendant, *licet sæpius, &c.*

The defendant demurred upon the declaration; and judgment was given for the plaintiff.

The errors assigned were, FIRST, That he ought to pay only for one wedding gown and petticoat which she used upon her marriage-day, and not for more; and entire damages being given, the judgment was erroneous.—But ALL THE JUSTICES AND BARONS conceived, that *wedding apparel* is to be taken, according to the common parlance, for apparel to be used upon the wedding-day and time of feasting, which is commonly for some days after, according to the dignity of the persons; and therefore the declaration was held good, and the damages well assessed.

THE SECOND ERROR assigned was, That the defendant appeared by John Green, his attorney, in *octabis Hilarii, anno 22. Jacobi regis*, whereas the said John Green was dead before the day which was alledged to be confessed by pleading in *nullo est erratum*.—*Sed non locatur*; for it is an error assigned against the record: and although it was said there ought to have been a special demurrer for that cause, yet it was held, that the *in nullo est erratum* alledged against the demurrer extends to the three errors assigned in the writ of error.

THE THIRD ERROR was, That the writ of enquiry of damages was awarded returnable *die Lunæ post quinden. Hilarii primo* CAPOLI, and the sheriff returned the inquisition taken before him 27 JANUARI, which was after the day of the return of the writ, and so without authority.—But forasmuch as it was not assigned upon the record, although in truth it was so, THE COURT would not take cognizance thereof; and it may be, that *die Lunæ post quinden. Hilarii* was the 28 or 29 day of JANUARY, and then the inquisition well taken, and so it shall be intended; and if not, the Court shall take notice thereof, unless it had been assigned. Whereupon the judgment was affirmed.

A promise, in consideration of marriage, to pay for the bride's "*wedding apparel*," means apparel suitable to her dignity during the festivity of the occasion, and not the clothes merely in which the nuptial ceremony was performed.

1. Com. Dig. 137.

It cannot be assigned for error, that the attorney on the record died before the day of appearance.  
Cro. Jac. 11. 355.  
Stra. 684.  
2. Bac. Abr. 220.  
Doug. 114, 115.

The exchequer chamber will not take cognizance of an error on the record, unless it be assigned as error.

1 Roll. Ab. 525.  
1. Sid. 301.  
Yelv 35  
Cro. Eliz. 210.  
Cro. Jac. 548.  
5. Com. Dig. 522

Ld. Ray. 354. Stra. 197.

Edward Davie against John Hawkins.

CASE 12.

In the Exchequer Chamber.

**T**RESPASS of his close-breaking, and depasturing with his cattle. The defendant justifies, For that one William Birch was seised in fee of a messuage and tenement in D. and he take to be in the plaintiff instead of the ancestor; Qu. If this is amendable?

CRO. CAR.

E

and

DAVIE  
against  
HAWKINS

Ante, 25.

Post. 78.

Cro. Jac. 435.

Co. Lit. 121. b.

1. Lev. 190.

Cowp. 425.

Dougl. 114.

3. Term Rep.

147.

and all those whose estate, &c. the said *Edward Davie* had in the said tenement, had used common, and so mistakes *Edward Davie* for *William Birchmore*; and that the said *William Birchmore* let those tenements to the defendant, who put in his cattle upon the common.

The plaintiff replies and traverseth, *ABSQUE HOC*, That the said *WILLIAM BIRCHMORE*, *et omnes illi quorum statum prædictus EDWARDUS habuit in tenementis*, &c. and so mistakes *Edward* for *William*; and thereupon issue joined in the same manner, and the verdict found, That the said *WILLIAM BIRCHMORE*, *et omnes illi quorum statum idem EDWARDUS habuit, non habuerunt communiam prout*, &c. and judgment was given for the plaintiff.

Error thereof was brought in the exchequer chamber, and this matter assigned, That it is a vain prescription, and none ought to prescribe in the party in whose right common is claimed in him or his ancestors, &c. And to alledge a *que estate* in the party is idle and repugnant, and the verdict finding it is void in itself; and so the judgment given thereupon is erroneous.

But it was moved, that it was but a misprision of the clerk, and the defendant may not take advantage of his own insufficiency in his plea, and prayed that it might be amended according to the case of *Sir Anthony Cook, Dyer, 260. 11. Hen. 7. 2.*

*SIR JOHN WALTER, Chief Baron, YELVERTON, MYSELF*, and *OTHERS*, conceived it could not be amended, because it is in matter of substance in all the proceedings, and in the verdict, &c. But *HUTTON* and *OTHERS* doubted thereof; whereupon the defendant in the writ of error, for his expedition, and that he might proceed *de novo*, moved by *MR. TYLOR*, his counsel, that it should be reversed; and so, without further argument, it was reversed.

#### CASE 13.

#### Player against Warn and Dews.

*In the Exchequer Chamber.*

In trover against two, the jury may find the defendants severally guilty as to part of the property, and not guilty as to the residue.

Post. 178.

1. Roll. Ab. 217.

2. Roll. Ab. 684.

Jones, 242.

Carth. 20.

Bull. N. P. 94.

Cro. Eliz. 860.

2. Bac. Ab. 9.

511.

2. Espin. Dig.

117.

Dougl. 377. 730.

2. Term Rep.

758.

3. Term Rep.

448.

**A**CTION of trover and conversion of two thousand loads of coals. Upon not guilty pleaded, the defendants were found guilty severally for several loads of coals, and were found severally not guilty for the residue, and judgment accordingly, and entire costs, and one *ideo in misericordiâ* against the defendants, and one *ideo in misericordiâ* against the plaintiff, *pro falso clamore*.

And thereupon a writ of error was brought in the exchequer chamber, and the error assigned, Because the judgment was against both the defendants for the several damages severally: for it was alledged that several damages ought not to have been assessed, but there being a joint trover and conversion laid to their charge, they ought to have been both found guilty, and they ought not to have been divided in the verdict and in the assessing of damages; and if they might be severed yet the plaintiff ought to have but the damages given against one of them, as it is in *Sir John Heydon's Case, 11. Co. 5. b. 44. Edw. 3. 7.*

But ALL THE JUSTICES AND BARONS agreed, that the plaintiff should have several damages; for being found severally guilty of several parcels converted, he shall have judgment accordingly. And it is not like *Sir John Heydon's Case*, where there was but one joint



point and sole trespass of battery, and so found; and there, although the damages were severally assessed, yet the plaintiff ought to take his judgment for damages but of one: but when the trespass is several, and so found, as in this Case, viz. the one at the one time, and the other at another, although it be contrary to the supposal of the writ, yet being found by verdict, it shall not abate the writ, and the plaintiff shall recover according to the verdict, as it is said there in *Heydon's Case*: so here this being severally found, and the conversion by them severally of several things, the damages are well assessed severally, and he shall have judgment against them severally for damages according to the verdict. And it was said that there were divers precedents in the king's bench and common pleas to that purpose.

PLAYER  
against  
WARN and  
DEWS.

Post. 193. 243.  
Cro. Jac. 118.  
Cro. Eliz. 860.

THE SECOND ERROR assigned was, That there ought to have been several judgments *de ideo in misericordia* against the defendants, and being otherwise it is error.—But against that IT WAS ALSO RESOLVED, that there shall be one judgment only of *misericordia* (a), although the defendants be severally found guilty; and so are the precedents. Whereupon the judgment was affirmed. *Vide 44. Edw. 3. & 9. Hen. 6. 12. Assises, 76.*

There shall be  
only one judgment  
in *misericordia*; although  
defendants are  
severally found  
guilty  
Post. 178.  
11. Co. 43. 2.

(a) See 16. & 17. Car. 2. c. 8. & 5. & 6. Will. 3. c. 12. Post. 178. note (a).

### Sir John Bennet against Doctor Easedale.

CASE 14.

AN ASSISE being brought by Sir John Bennet for the office of A pardon of a  
chancellor of the archbishop of York, the defendant endeavored to obtain an injunction out of the star chamber to stay his sentence in the  
said Sir John Bennet's suit, he having lately by sentence and deprivation, for  
there (for bribery and other misdemeanors in his office of judge bribery in the  
the prerogative court) been fined twenty thousand pounds, and office of chan-  
and made incapable of any office of judi- cellor of a pro-  
ce; by reason whereof, being disabled to hold the office in ques- vince, dis-  
the defendant obtained it, and pretending this assise was brought charges not  
Sir John Bennet that he might enjoy the said office contrary to the only the sen-  
tence but the  
free, he therefore prayed to stay his proceedings. consequent disabili-  
ties.

Sir John Bennet, thereupon, having day given him to shew cause why an injunction should not be granted, shewed then a pardon from the late king after the said sentence, wherein was recited all the crimes and offences contained in the said decree, and all penalties and punishments by reason thereof, and all disabilities and incapacities, and all things concerning the said sentence, except the said fine of twenty thousand pounds.

5. Co. 51.  
Cro. Jac. 335.  
2. Bulst. 182.  
3. Inst. 238.  
Cro. Eliz. 684.  
Moor, 916.  
2. Hawk. P. C. 633.  
4. Bl. Com. 371.

The court of star-chamber thereupon requested SIR JOHN WALTON, Chief Baron, and SIR FRANCIS HARVEY, third justice of the common pleas, to call to them all the justices and barons, and to consider of the said decree and pardon, and to certify their opinions, whether it were fit to permit the proceedings in the assise or not: and the justices and barons being assembled at *Serjeants-inn*, the sentence and pardon were read before them, and the case argued by counsel on both sides.

And it was resolved by THE JUSTICES AND BARONS, that this injunction hath taken away all force of the sentence in the star chamber,

SIR J. BENNET <sup>against</sup> except for the fine of twenty thousand pounds, and all inabilities are  
 DR. EASEDALE. discharged thereby, and that the sentence never took from him the  
 office, but the execution thereof, nor gave authority to place others:  
 Post. 65. but if the archbishop, before the pardon and after the sentence, had  
 Co. Litt. 233. b. appointed him to execute his office, and he durst not do it, then per-  
 9. Co. 50. adventure the said archbishop, for his *non-attendance*, might have  
 seized the said office, and have granted it to another; but the sentence  
 by itself cannot take away the office, which is a freehold: and the  
 pardon having taken away all the offences, they therefore conceived  
 it convenient to permit him to proceed with his *assise*, and, if doubt-  
 ful, it may be found specially, and so receive a judicial hearing.

## CASE 15.

## Memorandum.

The death of  
 HOBART, C. J.  
 and the promo-  
 tion of  
 RICHARDSON.

AFTER the death of SIR HENRY HOBART, knight and ba-  
 ronet, Chief Justice of the common pleas, SIR RICHARD  
 HUTTON sat Prime Judge all *Hilary* Term following, and in both  
 the Terms of *Easter* and *Trinity* until the last day of *Michaelmas*  
 Term, viz. 28. November, 2. Car. 1. when SIR THOMAS RICH-  
 ARDSON was made Chief Justice of the said court, and all the writs  
 which issued the said *Michaelmas* Term, from *quindenā Sancti Martini*  
 to the end thereof, did bear *teste* as well under the name of the said  
 SIR RICHARD HUTTON as of the said THOMAS RICHARDSON.

*Hilary*

## Hilary Term,

### 2. Car. 1. In the Common Pleas.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir Richard Hutton, *Knt.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

Hearn against Allen.

Trinity Term, 22. Jac. 1. and Hilary Term, 1. Car. 1. Roll 1876.

**EJECTMENT** of two acres of meadow in *Kingham*, of the demise of *Anne Keene*, upon the 26 March, 22. Jac. 1. for seven years from the Purification before the ejectment.

Upon not guilty pleaded, a special verdict was found, that one *Richard Keene* was seised in fee of a messuage and of two acres of land in *Chipping Norton*, and of the said two acres of meadow in *Kingham*, and used and occupied the said two acres of meadow, being four miles distant from the said house, together with his lands and tenements in *Chipping Norton*, and held them all in socage; and being so seised, upon the 20 May, 30. Eliz. by his will in writing devised the said house, "*cum omnibus et singulis pertinentiis ad inde vel aliquo modo spectantibus THOMÆ KEENE, filio suo, et hæredibus suis IN PERPETUUM; et pro defectu hæredum prædicti THOMÆ KEENE, to Anne Keene, daughter of the said Richard Keene, and to her heirs for ever; and for default of the heirs of the said ANNE KEENE, tunc prædictum messuagium cum pertinentiis JOHANNI KEENE, consanguineo suo, et hæredibus suis IN PERPETUUM.*" And the said *Richard Keene* by the said will devised "*omnes terras suas, et omnia bona sua mobilia et immobilia,*" to *Elizabeth* his wife during her viduity. And the said *Richard Keene* afterwards died, the said *Thomas Keene* being his son and heir; and that the said *Elizabeth* entered and was seised: and the said *Thomas Keene* entered into the said two acres of meadow and disseised the said *Elizabeth*; and afterwards, upon 12 December, 37. Eliz. infeoffed thereof *Edward Keene* with warranty against him and his heirs: and that *Thomas Keene* died without issue, and that the said *Anne*, daughter to the said *Richard Keene*, was his sister and heir; and that afterwards *Edward Keene*, being so seised, devised that land to *Anne* his wife for her life, and died; and that the said *Anne Keene* entered, and let to the plaintiff, who entered, and the defendant ejected him; *et si super totam materiam, &c.*

This case was argued at the bar: FIRST, Whether by this devise of *Richard Keene* of the messuage *cum pertinentiis*, those two acres of meadow passed, being used with it?

And ALL THE COURT conceived they did not pass (a), because by the words "*cum pertinentiis*" land passeth not, but only such

(a) Vide post, 169. and see *Ewer v. Hudson*, Moor, 359. that the land did pass with the house. See vide *Owen*, 74. and

2. *Ander*, 123; contra. *L. C. B. Parker's MSS.*



HEARN  
against  
ALLEN.

things which properly may be pertaining. Otherwise it is if it had been "*cum terris pertinentibus*," then that which was used to it would have passed; but by the bare words *cum pertinentiis*, without other circumstances to declare his intent, they shall never pass. *Vide Hill v. Grange*, 23. *Hen.* 8. 6.

A devise to A. and his heirs, and if he die without heir then to a stranger, passes an estate in fee to A.; but a devise to A. and his heirs and if he die without heir then to his sister in fee, passes an estate in tail only; for the sister being his heir, it appears that the testator meant heirs of his body.

THE SECOND QUESTION was, Admitting they pass, Whether it be an estate-tail in *Thomas* and the remainder in *Anne* (under whom the defendant pretends to claim, as it was affirmed), or a fee simple in *Thomas* and the remainder void? For it was agreed, that if the remainder had been limited to a mere stranger, the first estate had been a fee and the remainder void, as it is 19. *Hen.* 8. & 29. *Hen.* 8. *Dyer*, 33. because no intent appears to make an estate-tail, but a fee simple, by the words, and then the remainder over is void: but here, when it is limited to the brother and his heirs, and, if he die without heir, to his sister, who is his heir, to whom he intended it should go, those words shew what heirs he intended, viz. heirs of the body; wherefore by his intent an estate-tail was to be created.—But in this point *RICHARDSON*, Chief Justice, *HUTTON*, and *HARVEY*, Justices, conceived it to be a fee, and not an estate-tail, and the remainder to be void; but *YELVERTON* and *MYSELE* held the contrary, and that such construction should be made as should make it agree with the intention of the party.

*Cro. Jac.* 290. 416. 591. *Moor*, 853. 3. *Bullst.* 195. 1. *Roll. Abr.* 836. *Hutt.* 85. *Com Rep.* 82. *Salk.* 233. 238. 3. *Lev.* 71. 1. *Peere Wms.* 24. *Ld. Raym.* 568. 2. *Eq. Caf. Abr.* 305. 308. 1. *Vezey*, 89. *Dougl.* 254. *Cowp.* 234. 833. 1. *Term Rep.* 596. 3. *Term Rep.* 83. 143. 484.

On a devise to A. and his heirs, with divers remainders over, if A. enter and make a feoffment with warranty, the remainders are barred—*Post.* 156. *Co. Lit.* 366. *Powell on Dev.* 238.

BUT WE ALL AGREED, there was a collateral warranty (a) descended which barred the remainder, and not a warranty commencing by disseisin, as was objected. *Vide 10. Co.* 95. *Seamor's Case*.

1. *Term Rep.* 738.

But because no title is here found at all for the defendant but *primer possession*, the matters in law cannot come in issue; and therefore, *quacunqve via data*, judgment ought to be given for the plaintiff; and judgment was given accordingly.

(a) See the 4. & 5. *Ann.* c. 16. and *Co. Lit.* 373. b. note (2)

#### CASE 2.

#### Smith against Ashe and his Wife.

In an action against husband and wife, if the husband be taken upon a *capias* or *exigent*, he shall not reverse the outlawry until the wife appears; or if he sue a charter of pardon, and a *scire facias* upon it, it shall not be allowed without the wife.—*S. C.*

FOR a debt due by the wife before marriage, the husband was returned "*outlawed*," and the wife "*waived*;" but before the return of the *exigent*, one *ELWISE*, an attorney, procured for the wife a *superfedeas*, surmising that the said wife had appeared by him as her attorney.

HENDEN now moved, that this appearance of the wife should be received.

AND ALL THE COURT conceived, that if upon the *exigent* the sheriff had returned "*reddiit se*," or upon *pluries capias* had returned "*cepi corpus*" for the wife, then her appearance should be entered, but not by attorney as it is here; and the *exigent* should issue only against the husband, and *idem dies* should be given to the wife.

*Hutton*, 86. *Cro. Jac.* 445. 1. *Roll. Abr.* 583. 1. *Leon.* 138. *Cro. Eliz.* 118. *Hob.* 179. 6. *Mod.* 86. 1. *Salk.* 115. 3. *Bac. Abr.* 751.

But

But when the husband upon the *exigent* is returned "*outlawed*," then it shall be entered "*ales sans jour*" for the wife, for the process is determined; and if he will purchase his pardon, he shall not have allowance thereupon in a *seire facias*, unless he appeared for himself and his wife.

SMITH  
against  
ASHE and his  
WIFE.

But if for the husband the sheriff should return "*cepi corpus*" upon a *pluries capias*, and a "*non est inventa*" for the wife, yet an *exigent* shall issue against both, because it is intendable the husband might bring in his wife; but if upon the *exigent* the sheriff returned "*reddidit se*" for the husband and for the wife, and she is *waived*, the husband shall go *sine die*.

But in this Case, because the *exigent* was returned against both, to be outlawed, the *superfedeas*, supposing the appearance of the wife, is merely idle and void; whereupon it was disallowed, and the *exigent* appointed to be filled against both. *Vide* 40. *Edw.* 3. 34. 43. *Edw.* 3. 18. 14. *Edw.* 3. 1. 3. *Hen.* 6. 14. 34. *Hen.* 6. 29. 14. *Hen.* 6. 14. 10. *Eliz.* *Dyer*, 271. 11. *Hen.* 4. 71. & 89. 9. *Edw.* 4. 23. 18. *Edw.* 4. 4.

### Sir Henry Mildmay's Case.

CASE 3.

*In the Exchequer Chamber.*

SIR HENRY MILD MAY, as administrator of Sir Thomas Mildmay, brings error of a judgment given against him in debt upon an obligation where *plenè administravit* was pleaded.

An administrator shall not find bail in error on a judgment for a debt of his intestate.

The question now was, Whether it shall be allowed without bail upon the statute of 3. *Jac.* 1. c. 8. ? because the words of the statute are general, "in every action."

*Cro. Jac.* 135.  
350. *Sed vide*  
1. *Lev.* 245.  
1. *Sid.* 368.  
2. *Keb.* 295.  
371.  
*Stra* 745  
*Ld Raym.* 1459.  
1. *Com. Dig.*  
481  
2. *Com. Dig.*  
555  
5. *Com. Dig.*  
295.  
4. *Mod.* 7.

But because the plaintiff brings error only as administrator, and the judgment against him was not for his proper debt or case, it was resolved by ALL THE COURT, that he is out of the intention of the statute, although he be within the words, it being against reason that he should be put to mainprize, and make that his proper debt where he brings only the suit as administrator: whereupon it was ruled accordingly, that the writ of error should be received, and a *superfedeas* awarded for the execution without putting in bail: and so WRIGHT, Clerk of the Errors, said, was the common practice upon that statute.

*See* 13 *Car.* 2. f. 9. and 16. and 17. *Car.* 2. c. 8. f. 5.

### Sir Charles Howard's Case.

CASE 4.

*In the Exchequer Chamber.*

UPON a conference of ALL THE JUSTICES AND BARONS in the presence of SIR JAMES LEY and the EARL OF MARLBOROUGH Lord Treasurer, who commanded them to be assembled, on a Case out of the exchequer, upon an information by English bill against Sir Charles Howard.

A park of which the king is seised in fee may be disparked, and all the deer therein granted over, by letters-patent under the great seal: and by such a grant the office of keeper is virtually dissolved  
*S. C. Hut.* 86  
*Jones*, 151.

THE KING was seised in fee of a park called Putney-moore-clap, and KING JAMES, by his letters-patents under THE GREAT SEAL, granted *officium custodis* of the said park to Sir Charles Howard, HABENDUM to him the said office, "*cum omnibus vadiis, feodis, wind-fall trees, profits, and commodities thereto belonging, in tam amplis modo et formâ prout aliquis alius officarius illud exercens habuit,*

SIR CHARLES  
HOWARD'S  
CASE.

*tenuit, et occupavit, seu gavisus fuit, et etiam pro consideratione prædictâ* granted unto him an annual fee of thirty pounds *per annum* issuing out of all his majesty's manors in that county, HABENDUM to him for life."

Afterwards the king which now is, by his letters-patents under THE GREAT SEAL, published his pleasure for disparking the said park, and grants all the deer therein to Sir Richard Weston, chancellor of the exchequer, with liberty to take and carry them away, &c.

THE ATTORNEY GENERAL argued this Case for the king; and Mr. ANDREWS, reader of Lincoln's-inn, for Sir Charles Howard. THE JUSTICES AND BARONS afterwards gave their opinions.

THE FIRST QUESTION was, Whether by these letters-patents the king may dissolve the park? and, If those letters-patents be a dissolving of the park?

THEY ALL AGREED, That the park is well dissolved, and shall no more be accounted a park, all the deer being destroyed; for a park consisteth of *vert* and *venison* and *enclosure*, and if it be determined in any of them, it is a total disparking; and notwithstanding the grant of the office the owner may well dispark it, according to the opinion of *Wyther's Case*, 6. *Edw.* 6. *Dyer*, 71.

THE SECOND QUESTION was, Admitting the park be dissolved, Whether the office of the keeper be determined? and, if determined, Whether Sir Charles Howard may have any remedy for the casual fees and profits?

If the king grant the office of parker, and afterward destroy the park, the office is virtually extinguished, and all the casual fees thereto annexed irrecoverably lost.

Co. Lit. 233.  
2. Inst. 199.  
Hob. 41. 43.  
Cro. Jac. 18.  
9. Co. 50.  
Hutton, 86.  
4. Com. Dig. 301.  
2. Bl. Com. 38. 416.

THEY ALL HELD, That the park being dissolved, the office dependent thereunto is determined, and the grantee of the custody thereof hath not any remedy; for it being the will of the owner of the park to dispark it, and to destroy the deer, the custody is then determined, for he cannot be keeper where there is neither deer nor wood, but all destroyed. And although it be true, that an officer who hath the grant of an office for life or years, and is to have the profit of casual fees, as steward, bailiff or parkership, (as it is in 31. *Hen.* 8. "grants" Broke, 134. & 34. *Hen.* 8. "grants" 93.) cannot be discharged of the office, for then he should not have his casual fees, that is to be understood, that the grantor cannot appoint another where the park or manor always continues, as 18. *Edw.* 4. fol. 9. resolves; but when the park itself is determined and disparked, the office which is appendant thereunto shall be also determined; but so long as the park continues a park, he may not discharge him of the office and make another officer, because he hath that office for his life, and the profits thereof consist in casualties: but the office of a keeper is in respect of the keeping of the park, and his casual profits are in respect of his pains and attendance upon the game, the keeping thereof; and it is to be intended, that at the beginning of that office they were only granted in respect thereof, and in continuance of time they are become appendant to the office, and when the park is destroyed so as there need not such attendance, then *cessante causâ cessat effectus*: as if one grant the office of steward with all profits of courts, if the manor be destroyed, the office, and with it the casual profits, are determined also; so here the park and the liberty of the park being determined, the office is determined in itself.

THE



THE THIRD QUESTION (admitting the office to be determined), Whether the annual fee of forty pounds, being granted in consideration thereof, issuing out of the king's manors in the county of Surry, be also determined?—And SIR JOHN WALTER, *Chief Baron*, held clearly it was; but ALL THE OTHER JUSTICES AND BARONS dissented from him in this point only, because it is granted by a distinct clause, and not out of the park: and although the office be determined, yet because it is not by the act or default of the grantee himself, but by the act of the grantor only, they conceived the grantee should enjoy that annuity. *Vide* 5. *Edw.* 4. 8. 7. *Edw.* 4. 22. *Plow.* 457. *Sir Thomas Wroth's Case*, and 381. *Sir Henry Nevill's Case*.

The grant of a collateral fee, as of forty pounds a-year to a parker for life, for the exercise of his office, is not determined, though the park be discharged, and the office thereby dissolved.

Hutton, 86.

Ante, 49. Post 280. Cro. Jac. 18. Co. Lit. 233. b.

Sir Gregory Fenner against Nicholson and Pasfeild.

CASE 5.

Hilary Term, 22. Jac. 1. Roll 239.

SIR GREGORY FENNER brings a *quare impedit* against Nicholson and Pasfeild, and the Bishop of London, as ordinary for the church of Chelmsford; and shews, that Sir Thomas Mildmay was seised, and presented Pasfeild, and let the manor to which the advowson is appendant to the plaintiff; and that the church became void by the resignation of Pasfeild, by reason whereof it belonged to him to present.

If A TRAVERSE be taken where there is a full confession and avoidance, it makes the plea double.

Yelv. 155.

The Bishop pleaded nothing but as ordinary. Pasfeild entitles himself to it by presentation, as to an advowson in gross, and traverseth the appendency; whereupon the plaintiff taketh issue. The defendant Nicholson pleaded as *parson imparsoner* of the presentation of the king; and, confessing the title of Sir Thomas Mildmay and the lease for years of the manor made to Sir Gregory Fenner, pleads over, that the said SIR THOMAS MILD MAY *pro quâdam pecuniæ summâ*, betwixt him and one John Josselin, presented the said Pasfeild, and pleaded the statute 31. *Eliz.* c. 9. (which makes a presentation upon simony, and the institution and induction thereupon, to be void), and that the king should have the title to present: so by reason of this presentation made by simony it is void, and belonged to the king to present; who presented the defendant Nicholson, who was admitted, instituted, and inducted; and traverseth, that the church became void by the resignation of Pasfeild, *prout*, &c.

Post. 354.

And thereupon it was demurred, and shewn for cause, That the traverse was insufficient to traverse matter not traversable, and that this plea is double (a).

HENDEN argued at the bar that this traverse is ill, because the presentment is the principal; which being confessed and avoided, cannot be traversed: for the avoiding and traversing make it double; and that being specially shewn for cause of demurrer, and the other joining in the demurrer, judgment ought to be for the plaintiff (b): also the pleading of the simony, "that *pro quâdam pecuniæ summâ*" it was agreed, &c. and not shewing for what sum, is uncertain and ill.

(a) By 4. & 5. Ann. c. 16. the plaintiff in replevin, and the defendant in any action, may, with the leave of the Court, plead as many pleas as he shall think fit. *Vide* Barnes, 357. Fortesc. 336. 1. Wilf.

223. and 5. Com. Dig. 67.

(b) And. 1. 1. Leon. 24. 80. 3. Mod. 319. Yelv. 151. 2. Vent. 213. Lut. 1558. 2. Saund 50. Carth. 166.

But

FENNER  
against  
NICHOLSON  
and PASFIELD.

Post. 105.

But ALL THE COURT conceived that the plea was good ; for the plea maketh the traverse but argumentative that he might not resign ; and being alledged that the church is void *per mortem vel resignationem*, or otherwise, it ought to be confessed or traversed, for that is the cause of his presentment ; and the issue ought to have been taken, *si vacavit per mortem, vel deprivationem vel resignationem* : for the presentation, admission, and institution, are but conducing to the resignation ; and the resignation or avoidance is the chiefest matter.— In *Say's Case (a)*, there was such an issue, *si vacavit per mortem* ; and in *Hilary Term*, in *Paschall's Case (b)*, in a *quare impedit* simony was alledged, and presentment by the king by reason thereof, &c. ; and traverseth the vacancy *per mortem* ; and in *Michaelmas Term*, 2. Car. 1. a presentment for simony was alledged to be made, and concluded with a traverse of the vacancy *per mortem* ; and so are the precedents, that the issue may be entered upon the avoidance, *viz.* if it be pleaded *per mortem, deprivationem, vel resignationem*, as the principal matter traversable, according to the precedents in the *Bk. of Ent.* 485. 490. 511. Whereupon judgment by consent was resolved to be given for the plaintiff against *Pasfield*, he relinquishing his plea, and confessing the action ; and upon the demurrer judgment should be given for the defendant : and so it was, and release of errors on both sides.

(a) Dyer, 376. Co. Ent. 499.

(b) 15. Jac. 1. Roll 2091.

#### CASE 6.

#### Fotherby's Case.

If the ordinary, after he has granted letters of administration, libel the administrator to make distribution of the intestate's effects to his children or kindred, a *prohibition* shall go. Post. 202. Hetley, 48. 68. Allen, 56.

9. Co. 39. b. Palm. 517. March. 13. Post. 201. Hob. 83. 191. 1. Lev. 157. 186. 233. 305. 1. Sid. 179. 372. Carth. 125. Ray. 93. 499. 1. Mod. 211. 1. Peere Will. 8. Strange, 911. 1. Com. Dig. 252. 4. Com. Dig. 512.

**P**ROHIBITION by *Fotherby*, administrator of *Fotherby*, for suing in the ecclesiastical court against him as administrator, to make distribution of some part of the personal estate to the sister and heir of the intestate ; surmising, that by the law of the land, the administration being committed to the intestate's wife, the ordinary hath no authority to intermeddle with making distribution of the goods of the intestate to the children or kindred.

SERJEANT HENDEN and SERJEANT FINCH strongly argued that such prohibition is not allowable : for when one dies intestate, the usual course hath been for the ordinary, after all debts paid, to give order for the distribution of one part of the goods to the wife, and another part to the children ; and if he hath not any children, then to his kindred.

But HUTTON, *Justice*, said, it is not reasonable, nor stands with law, but the ordinary should assume such a power : for by the statute of 31. *Edw.* 3. c. 11. the ordinary is compellable to commit administration (a) ; and the administrator is only chargeable, and the ordinary hath no more to meddle with it ; and it would be mischievous if the ordinary should compel him to make distribution ; for peradventure he may be chargeable with actions of debts unknown after good accompt ; also the administrator, by the administration of the goods committed to him, hath an absolute interest in them, with which the ordinary hath not to meddle : and although at the civil law the administrator was accountable, as servant to the ordinary, and might be discharged by him, and a repeal might have been of the letters of administration at the ordinary's pleasure, yet at this day, especially after

(a) By mandamus, *Strange*, 552. 892.

the

the statute of 21. Hen. 8. c. . the administration being duly committed by the ordinary, cannot now be repealed; and if there be a suit to have it repealed, a prohibition lies; and divers prohibitions in such cases have been granted. As to the case in question, he said, he knew when he was at the bar, and since he came to the bench, that divers prohibitions had been granted, where the administrator was sued to make distribution; as in *Clerk's Case*, and *Mich. 29. Jac. 1. Roll 2196. Jane Swyft*, administratrix of *Hugh Swyft*, she being bound in an obligation of two hundred pounds to the ordinary to make true administration, exhibit a true inventory, make a perfect accompt, and to distribute the surplusage after all debts and legacies paid, at the appointment of the ordinary; and being sued before *Dr. Seaman*, commissary to the bishop of *Gloucester*, to make distribution, moved for a prohibition; which was granted upon good advice by award of the court. So hereupon a prohibition was likewise granted in *Trin. 14. Jac. 1.*

FOTHERBY'S CASE.

R. 37. 141.

Hedl. 68.

Post. 201.

HOBART, WARBERTON, WINCH, and HUTTON, resolved, in the case of *Tooker v. Loan (a)*, that a prohibition should be granted to the delegates in an appeal of such sentence from the ordinary, for adjudging to make distribution *(b)*, and *Hilary, 9. Jac. 1. Roll 1608. for Watts.*

(a) Hobart, 191. See also *Levane's* & 23. Car. 2. c. 10. Raym. 499. 1. Case. Post. 201. Peere Will. 7. 2. Bac. Abr. 411. 414.

(b) See the stat. of distributions, 22. 29. Car. 2. c. 3. f. 35.

### Sydney against Dr. Mundford.

CASE 7.

*In the Exchequer Chamber.*

ERROR in the exchequer chamber of a judgment in the king's bench. The case was, That *Dr. Mundford* brought trespass for three loads of oats taken at *Tewing* 20th Sept. 20. Jac. 1. The defendant justifies, because the place WHERE, &c. is parcel of a copyhold in *Tewing*, and makes title to it, and justifies for *damage feasant*. The plaintiff shews, that long before the time WHEN, *et prædicto tempore quo*, &c. he was parson of *Tewing*, and that the place WHERE is within his rectory and the titheable places thereof; and that the defendant being a copyholder there, the 20th Sept. 20. Jac. 1. let it to one *Hawkes*, to have it from year to year, *quamdiu ambabus partibus placerent*; and that *Hawkes* entered, and plowed, sowed, took the crop, and set out the said oats for his tithes; and the defendant *de injuriâ suâ propriâ* took the oats, *prædicto tempore quo*, &c. The defendant maintaining his bar traversed the lease; and it was found for the plaintiff, and judgment for him.

TRESPASS for oats JUSTIFICATION *damage feasant*, REP. *tempore quo et diu antea* he was parson and took for tithes. This is sufficiently certain, though he does not shew himself parson when they were severed.

Ante, 6. Post. 80. 195.

And now the error was assigned, for that he alledged he was parson *tempore quo*, &c. and at the time of the trespass supposed *ac diu antea*, but doth not say that at the time of the severance of the corn he was parson, for it shall not be intended without shewing it, but rather that he was parson at the time of the trespass, and not at the time of the severance; and then he makes not a sufficient title to them.

3 Bulst. 336. Cro Jac. 67. 86. Wilf. 123. Barnes, 163. Burr. 772. Cowp. 682. Dougl. 158.

BUT ALL THE JUSTICES AND BARONS conceived it was well enough, and shall be intended, by all the circumstances, that he was parson at the time of the severance; for it is said, "*antea et tempore quo fui PARSON, et adhuc est*, &c.; and especially the defendant having



SYDLEY  
against  
DR. MUND-  
FORD.

Cro. Jac. 57.

having admitted that he was parson, and the said tithes due to him, and making traverse to the lease, which was an idle traverse, and therefore good cause of demurrer: and the replication is good; for being pleaded that "*diu. antea et tempore quo, &c.*" he was parson, it is certainly enough intended he was parson at the time of the severance, as well as at the time of the taking. Whereupon judgment was affirmed, notwithstanding THE YEAR-BOOK 35. Hen. 6. fol. 48. which was much insisted upon.

CASE 8.

### The Earl of Lincoln's Case.

*In the Star Chamber.*

Peers of the realm in all criminal cases must in courts of equity put in their answer upon oath; and where they are witnesses between party and party, they ought to be sworn.

Hutton, 87.

Jones, 132. 154.

1. Bl. Com. 402.

2. Salk. 512.

1. Peere Will.

146.

Ord. Chan. 40.

2. Eq. Ca. Ab.

14. pl. 4.

Mitford's

Pleadings, 9.

**M**EMORANDUM, That upon the 13th February, 1626, in the court of star-chamber, all the justices of both benches being there (except JUSTICE DODERIDGE), and all the barons of the exchequer, and a very great assembly of the lords, viz. The Lord Keeper, Lord Treasurer, Lord President of the Council, The Duke of Buckingham, The Earl of Pembroke, Lord Steward, The Earl of Suffolk, Earl of Carlisle, Earl of Holland, The Lord Chancellor of Scotland, The Lord Conway principal secretary, The Lord Carlton, and divers others of the privy council;

IT WAS MOVED, Whereas Sir Henry Fines, knight, had exhibited his bill in the star chamber against the Earl of Lincoln for divers riots and other misdemeanours, and the Earl of Lincoln had taken a commission forth to put in his answer upon oath in the country, and he offered before them his answer upon his honour, but would not put it in upon oath, because he was a peer of the realm; which matter being now reported by the commissioners, it was now moved by the KING'S SOLICITOR to have the resolution of the Court.

And it was held by ALL THE JUSTICES, who delivered their opinions *seriatim*, that the lords, in cases criminal, especially where the king is party, ought to put in their answer upon oath; and in all cases where they are to be witnesses between party and party, they ought to be sworn. And the Lord Keeper said, *quod in judicio non creditur nisi juratis*, and that he had caused precedents to be searched, and had found divers since the first of queen Elizabeth, wherein peers of the realm being impleaded in chancery, or star chamber, or court of wards, have been always sworn: and he said, when a peer affirms any thing which is not true upon his honour, there is not any remedy; but if he affirms that which is false upon his oath, there is remedy by the 5. Eliz. c. 9. against perjury: wherefore THEY ALL RESOLVED that the Earl of Lincoln ought to be sworn. All the lords and counsellors were of the same opinion. which they delivered *seriatim*, *nullo contradicente*, because it is *juramentum purgationis*, and not *promissionis*: and princes are sworn to all their leagues and confederacies, which is called *juramentum confirmationis*; neither is it any diminution to the said earl's honour to be sworn about that which he would not should be put upon his honour.

## Sutton's Case.

CASE 9.

**SUTTON**, chancellor of the bishop of *Gloucester*, moved for a prohibition to stay a suit before the commissioners ecclesiastical, for that articles were there exhibited against him, because he being a divine, and having a rectory with cure of souls, and never brought up in the science of the civil or canon laws, and not having any intelligence in them, took upon him the office of the chancellor of the bishop of *Gloucester*: whereas there were divers canons and ecclesiastical constitutions, and also directions from the late king *James*, and from the king that now is, that none should be admitted to have those offices of chancellorship to a bishop, unless he were instructed and learned in the canon and civil laws, because divers causes triable in the said courts are of weight; and the judges there ought to have knowledge of the laws, otherwise they cannot administer right to the king's subjects.

Upon these articles *Mr. Sutton* being examined, confessed that he was a divine, and had a spiritual living, and that the office of the chancellorship of the bishop is grantable for life, and that such a bishop of *Gloucester* had granted to him the office for his life, which the dean and chapter had confirmed, whereby he had a freehold therein, and ought to enjoy it during his life; and that notwithstanding this answer they intended to proceed against him: wherefore he prayed to have prohibition.

But THE COURT denied it; for if he be a person unskilful in those laws, and by law ought not to enjoy it, they may peradventure examine that: for although a lay person, by his admission and institution to a benefice, hath a freehold, yet he may be sued in the spiritual court, and deprived for that cause; but if he hath wrong, he may peradventure by *assise* try it. Therefore a prohibition was denied.

The Court will not grant a prohibition to stay a suit in the ecclesiastical court against the chancellor of a bishop to examine whether he be skilled in the civil law, although the bishop had granted him the office for life.

Ante, 56.

Jones, 393.

2. Roll. Ab. 286.

Latch. 238.

Noy, 91.

Godb. 390.

4. Mod. 27.

Ray, 88.

Fitz. 190. 273.

## Memorandum.

CASE 10.

**I**N this Term **SIR NICHOLAS HYDE**, of the *Middle-Temple*, was made the king's serjeant, and by special commission directed to **SIR JAMES LEY**, lord treasurer of *England* (because the Lord Keeper was sick), being made by writ Chief Justice of the king's bench, he was there sworn in the place of **SIR RANDOLPH CREW**, who was the last Term discharged of his place.

**HYDE** appointed Chief Justice of the king's bench.

Ante, 52.

Post. 225. 375.

Easter

100



## Easter Term,

### 3. Car. 1. In the Common Pleas.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir Richard Hutton, *Knt*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

}

*Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Memorandum.

#### CASE 1.

THE first day of this Term two new serjeants were made, viz. SIR ROBERT BERKLEY, of the *Middle Temple*, and ROWLEY WARD, of the same house: they had their writs in the vacation, returnable *quindena Paschæ*, and appeared in chancery the first day of this Term: and upon the *Thursday* se'nnight following, ALL THE JUSTICES AND BARONS being assembled at *Serjeant's-Inn*, in *Fleet-street*, the new serjeants came in their party-coloured robes, with the marshal and warden of the *Fleet* before them, and so presented themselves before the justices; and because it was against course, for they ought to have come in their robes of *brown-blue*, ALIAS *black-coloured*, they were sent back again. Also they came into the said hall, each of them having his servant bearing his *scarlet hood*, his *quoif*, and *cap* before him; but that also being against course, for every servant ought immediately to follow, and not precede his serjeant, they were directed to go back again, and return in their gowns of *brown-blue*, and then (without any speech made to them by the Chief Justice, as the usual manner is) they recited their counts, and had their writs read. They directed their speech to the chief justice of the common pleas, and then went and kneeled down before the two chief justices, who putting on their *quoifs* and *scarlet hoods*, they then returned to their chambers, and from thence went in their party-coloured robes to *Westminster*, and were each of them presented at the common pleas by two ancient serjeants, and gave rings with this inscription, "*Lege Deus et Rex*;" and they made their feasts at *Serjeant's-Inn*, in *Fleet-street*, at which the Lord Treasurer, the Earl of *Manchester*, President of the Council, and all the Justices, Barons, Serjeants, the King's Council, and prothonotaries were present, and none others. The said SIR ROBERT BERKLEY was the same Term sworn the king's serjeant at law.

The ceremonies to be observed on a call of serjeants. Post. 71.

Post. 85.

### The Case of Lord Morley and the Bishop of Chichester.

#### CASE 2.

#### *In the Star Chamber.*

IN this Term all the justices were assembled at *Serjeant's-Inn*, upon a case referred out of THE STAR CHAMBER betwixt Lord Morley and the Bishop of Chichester, which was thus: If a bill in equity against two defendants be referred for scandal against one of them, and after a pardon of all contempts, the bill be taken off the file and dismissed as scandalous with costs, the costs are discharged by the pardon. Ante, 9. 47. Post. 199.

Lord

LORD MORLEY  
against  
THE BISHOP OF  
CHICHESTER.

5 Co. 51.  
Cro. Jac. 335.  
2. Roll. Abr.  
178. 304.  
Yelv. 99.  
2. Hawk. P. C.  
558.

Lord Morley and Sir Richard Molineux exhibited a bill in the star chamber, in Michaelmas Term, 19. Jac. 1. against the Bishop of Chichester and James Hutchinson, which was scandalous, and a libel against the bishop. In the 21. Jac. 1. came the general pardon, wherein all offences (not treason) were pardoned. Afterwards in the 22. Jac. 1. there was a motion in the said court for the bishop, that the bill against him being scandalous might be taken off the file; whereupon it was ordered accordingly, unless cause were shewn before such a day: when no cause being shewn, it was ordered to be taken off the file, and the plaintiff to be fined one hundred pounds to the king; and one hundred pounds damages were given to the bishop.

The plaintiff now prayed to have benefit of the pardon, and to be discharged of costs to the party; and thereupon cited the case of *Beverley v. Poyer* (a), where, upon such bill, fine being given to the king against the one defendant, and the other dismissed, and fine against the plaintiff, and damages of 500 marks assessed to the defendant against the plaintiff, because the bill was scandalous and a libel as against him, although the bill was before the general pardon, and the sentence after, yet it was resolved by advice of all the justices, that the pardon shall relate and discharge the plaintiff's offence, and that the sentence against him, for the fine and costs, was taken away, because it was not a bill depending, *quoad* the said defendant against the plaintiff; but *quoad* the other defendant the sentence was good, being for an offence whereof the bill is depending, which is excepted within the pardon: therefore the fine was well assessed as to him; but *quoad* the fine against the plaintiff, the pardon takes hold and remitteth it.

So here IT WAS RESOLVED, that the fine and costs are discharged by reason of the pardon, and that there is not any difference betwixt this and *Beverley's Case*, although that day was here given to shew cause; for he hath not any means to plead the pardon. Wherefore they all resolved, that this general pardon intervening betwixt the bill and the sentence for the fine and costs, the plaintiff ought to be discharged of the said fine and costs by reason thereof.

(a) Hutton, 79.

### CASE 3.

### Langham against the Wife of John Bewett,

Upon a *hab. cor.* returning that the defendant was detained for a debt as a *feme sole merchant*, the Court may receive extrinsic evidence that she was not such a trader, in order to admit her to bail as a *feme covert*.

UPON an *habeas corpus* to London to remove the body cum causa of the wife of Bewett, it was returned, that an action of debt was brought against her and her husband in London, as a *feme sole merchant*, for wares bought by the said wife, wherein the husband is only named for conformity, and by the custom the execution should be only against her. Upon this returned before the LORD RICHARDSON, he took bail *de bene esse*, because it was affirmed that the *feme merchantized* only for her husband in buying wines (her husband being a vintner); in which case it seemeth she is out of the custom, and so ought not to be charged. And it was moved to have the direction of the Court what should be done, for the *feme* continued in prison.

Moor, 135.

Hetl. 9. Mod. Rep. 26. 3. Burr. 1376. 1776. 1. Com. Dig. 544. 4. Term Rep. 361.

The







The custom of *London* was read, "That a *feme sole merchant* is "where the *feme* trades by herself in one trade, with which her husband doth not meddle, and buys and sells in trade," there the *feme* shall be sued, and the husband named only for conformity; and if judgment be given against him, execution shall be only against the *feme*.

LANGHAM  
against  
The Wife of  
BEWETT.

RICHARDSON and YELVERTON conceived, that she should be discharged; for when it appears by examination that she used the trade which her husband used, she in law is but servant to her husband, and the wares coming to his use, he, by intendment, is to be sued: and this case is out of the custom; for it seemeth this custom intendeth only where the *feme* useth one trade, and the husband another, and doth not meddle with his wife's trade, nor the wife with the husband's; but when she deals in her husband's trade, and in none other, it shall be accounted her husband's trade, and then the husband ought to be sued, and not the wife.

Judg. Ref. 89.  
4. Term Rep.  
361.

But HUTTON, HARVEY, and MYSELF were of another opinion, forasmuch as the writ had returned, that she was sued in *London* as a *feme sole merchant*, according to the custom of *London*; and therefore this is such an action and cause wherewith this court ought not to meddle, nor take cognizance, nor can give the party relief, although he hath good cause of suit: for in *London* they are judges of their own customs, and by intendment will proceed in their courts there according to their customs, and not otherwise; and therefore we ought not to take away their privileges, nor remove the action out of that court, where we cannot give remedy in this; and it is a foreign surmise, that it appears not in the return the *feme* used the same trade her husband used.

Also they conceived, although she used the same trade that her husband at any time used, as in this case is pretended, yet because at that time of the contract (as was affirmed) the husband did not meddle with the trade, but she only used it, and the husband was then in the king's service beyond seas as a soldier (a), and although he now returned bare and needy, yet as he did not meddle with the trade (as was affirmed by oath), and these contracts were made in his absence (as was likewise testified by oath), it is no reason to except bail where an action cannot be grounded upon that contract in this court, but to remand the cause, according to THE YEAR-BOOKS of 1 Edw. 4. pl. 6. 35. Hen. 6. pl. 28. 9. Edw. 4. 4. 35. 21. Hen. 7. pl. 18.

A wife may  
carry on her  
husband's bu-  
siness as a *feme*  
*sole trader*.

3. Term Rep  
618.

Afterwards it was agreed and compounded, and nothing done.

Vide Mich. 29. Hen. 6. Roll 344. *Geppings v. Harding* (b). This she pleaded, and issue taken, Whether she were a *feme sole merchant* or trespass for goods taken by her delivery? and found for the plaintiff, that she was not a *feme sole merchant*: so that every *feme* who trades in *London* is not a merchant.

(a) 2. Inst. 713. 3. Peere Will. 37. where it is said that this case is not to be  
(b) See 1. Bl. Rep. 571. 3. Burr. 1778. found in the Year-Books. 1. Com. Dig. 544.

## CASE 4:

## March against Culpepper and Anne his Wife.

Hilary Term, 2. Car. 1. Roll

In an *assumpsit* on a promise, that if the plaintiff would submit his accounts to A. B. the defendant would pay as much as should be found due from his wife as *executrix* of her former husband, is good; for the submission of the accounts to inspection of the arbitrator is sufficient consideration.

S. C. Hetley, 1. 8. 11.

Cro. Eliz. 67. 150.

1. Bac. Ab. 170. 171.

2. Term Rep. 479.

**A**SSUMPSIT. Whereas one *Hugh Goddard* was indebted to the plaintiff in 107l. for wares sold to him by the plaintiff, and died intestate, the said 107l. being due, and not paid; and administration committed to the wife of the defendant, for which 107l. the plaintiff intended to sue the said wife as administratrix; but the husband of the said ANNE, *dum sola fuit*, desiring to know the true debt which the said *Hugh*, her former husband, at the time of his death owed to the plaintiff, the 30th July, 1. Car. 1. required the plaintiff, *quod quidem WILLIHELMUS WHITEMAN, EGIDIVS DIGGS, et HUGO OWAN, superviderent compotum* betwixt the plaintiff and the intestate of and concerning the said wares sold, &c. *ut suam certitudinem cognosceret*; whereto the plaintiff assented: and then they finding, *super visum compoti*, that the said *Hugh* the intestate, at the time of his death, was indebted to the plaintiff in the said sum of 107l. gave notice thereof to the defendant ANNE the same day, &c.; and the said ANNE knowing that the intestate at the time of his death was indebted to the plaintiff in the said sum, the said ANNE, *dum sola fuit*, in consideration of the premises, *adunc et ibidem, scilicet*, the said 30th July, 1. Car. 1. promised the plaintiff to pay to him the said 107l. in this manner, *viz.* part thereof before the end of *Michaelmas Term* then next ensuing, and the residue within reasonable time after: and alledges in fact, that the said *Michaelmas Term* began at *Reading*, and ended such a day, and that neither the said ANNE, *dum sola fuit*, nor the husband and wife during the *coverture*, had paid the said 107l. or any part thereof.

The defendant pleaded to issue; and it was found for the plaintiff: and alledged in arrest of judgment, that here is not any sufficient consideration shewn to ground the action; for there is not any matter of profit or advantage to the defendant, nor any matter of charge or trouble to the plaintiff, and without one of them there is not any consideration to charge the defendant, and to make him liable to pay it out of his own proper goods; for the promise of the wife, *dum sola fuit*, shall not tie him without valuable consideration.

But LORD RICHARDSON, HUTTON, HARVEY, and YELVERTON conceived, he did a thing at her request which he needed not, *viz.* shew his accompts to her three friends appointed by her; which is a trouble to him, and more than he needed to have done. And it seemeth the consideration is sufficient, and the breach of promise made thereupon just cause of suit, especially the promising to pay at two days; which implies that in the *interim* the plaintiff should forbear his suit; which being found by verdict, is a good consideration. And thereupon the plaintiff had judgment.

Post. 77. 160. 273 409.



## Memorandum

CASE 5.

AFTER the end of this Term, two other new serjeants were made, viz. ALIFF, of Lincoln's-inn, and ROBERT CALLICE, of Gray's-inn. Their writs were returnable *tres septimanas PASCHÆ*; they appeared in chancery *quarto die post* the same return; kept their feasts at Serjeant's-inn in Fleet-street; observed the same form in their presentation as was before; and gave rings, *quorum inscriptio fuit*, "RIGIS ORACULA LEGES."

A call of serjeants.

Ante, 67.

## The Soldier's Case.

CASE 6.

THIS Case, by his majesty's command, was propounded to all the judges to be by them resolved: Whereas one who had received press-money to serve the king in his wars, was enrolled, had taken pay, and was delivered amongst the other soldiers to A CONDUCTOR to be brought to the sea-side, did afterward withdraw himself, and ran away without licence: Whether this departure be felony, &c.?

A soldier enlisted, who departs from the conductor as he is leading him to the sea-side, is guilty of felony; for although the statutes make a departure in such case from the captain felony, yet for the public service and good of the realm a conductor shall be considered in this case as captain

Upon conference and debate hereof, it was conceived by HURTON, YELVERTON, and MYSELF, That it was not felony, either by the statutes of 7. Hen. 7. c. 1. or by 3. Hen. 8. c. 1. which are the sole material statutes to this point; as it is resolved 6. Co. 27. the Case of Soldiers, that those statutes mention only departure from their captain, who is a special named person, and of special note and place, and the soldier who departs ought to be delivered to him as his captain, and he ought to be a captain in war; and A CONDUCTOR is such a person only who is hired to guide them in the way, or part of the way, to their captain; and such conductors are new officers, for in ancient time soldiers were taken and pressed by the captains themselves: therefore this not being a departure from his captain, is not felony.

S. C. Hutt. 134.  
Co. Lit. 71.  
3. Inst. 86.  
6. Co. 27.  
4. Bac. Abr. 652.

But it was resolved by HIDE and RICHARDSON, Chief Justices, WALTER, Chief Baron, DODERIDGE, HARVEY, JONES, and WHITLOCK, Justices, and DENHAM and TREVOR, Barons of the Exchequer, That such departure without licence from his conductor was felony: for they held, that a conductor is a captain within the intention and meaning of the statutes of 7. Hen. 7. c. 1. & 3. Hen. 8. c. 1. which statutes, although they be penal, yet being made for the public service and good of the king and realm, may very well be taken liberally according to the intent of the makers; for a captain is but a conductor, leader, or chieftain, and so is a conductor, for he is one to command and lead them the way they are to go; and the statute of 7. Hen. 7. c. 1. doth not speak of captains, but of lieutenants, which in common acceptation is somewhat more than a captain, and yet no doubt but a captain is within the said statute; and by the same reason a conductor, who is somewhat less than a captain, may be a captain within the statute of 3. Hen. 8. c. 1. which speaks of captains and petty captains, and a conductor is a petty captain: *conductor dicitur à conducendo*, which is to hire or press, or to guide, direct, or go along together in the way; and *conductores militum* are pressers of soldiers;

(a) See the  
Mutiny Act.

therefore a conductor is a captain within these statutes, and a departure from him without licence is felony (a).

ANOTHER POINT was moved, How and before whom this felony should be tried? because it is a new law which makes a new felony, and it appoints, that it ought to be tried before the justices of peace at their sessions. Whereupon a doubt arose, Whether justices of assize, and justices of *oyer and terminer*, may by their commission try it or not? And herein was not any resolution given; but the greater opinion was, that the justices of *oyer and terminer* may try it by their commission.

### Wilcocks against Bradell

**P**ROHIBITION by Wilcocks against Bradell, the wife of John Bradell, principal of St. Mary Hall in Oxford, and Christian, the daughter of the said John Bradell, to stay their suits in the vice-chancellor's court of Oxford, for that whereas—James Bradell had libelled against him in the vice-chancellor's court of Oxford for calling her "barren", and "old barren", which is termed there the action of injury;—and Christian for these words, "barren", and "old barren", and that he did strike her—For staying of these suits, sentence being given against him in both, Wilcocks in a writ of prohibition, prayed to have several prohibitions.

And now the agent for the university moved for a constitution, and shewed the charters of the university of the 14. Ric. 2. and the 14. Hen. 8. whereby is granted to them, that they may induce the 14. Hen. 8. whereby is granted to them, that they may induce of all trespasses, injuries, and of all pleas and damages, and of all other crimes and matters (except pleas of trunkment), where a scholar or their servants or ministers "just and pertinent, at log-  
"atticism et correctionem inde habent, secundum eorum statuta et con-  
"iustitias, vel secundum legem regni Anglie, ad constitutionem  
"cancellarii; in quibus iusticiis de hanc partem de common a  
"vel iusticiis de assise, non se intromittant. Et si iusticiis  
"universi, seu aliquantiter cognoscere seu intromittant per iustici-  
"super certificationem, notificationem, seu notificationem cancell-  
"veritatis seu eius commissarii, inquisitionem seu cognitionem de  
"illa coram cancellario seu commissariis suo summario iustitiam  
"in iura in forma prebenda; and that these charters were  
"by act of parliament, 13. Ric. 2. (and so were  
"in the act); and because Wilcocks was a scholar and  
"of the said university, it was prayed that the writ should be  
"mandated.

It was much debated at the bar and bench, for  
plaintiffs were women, who were not  
there, and the defendants who is the school  
privilege, but was a whole it was moved that

3. Car. 1. In the Common Pleas.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir Richard Hutton, *Knt.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Justices.

Wilcocks against Bradell.

CASE I

**P**ROHIBITION by *Wilcocks* against *Jane Bradell*, the wife of *John Bradell*, principal of *St Mary Hall* in *Oxford*, and *Christian*, the daughter of the said *John Bradell*, to stay their suits in the vice-chancellor's court of *Oxford*, for that whereas—*Jane Bradell* had libelled against him in the vice-chancellor's court of *Oxford* for calling her "*bawd*" and "*old bawd*," which is termed the action of injury;—and *Christian* for these words, "*scurvy*" "*whore*" and "*jade*," and that he did strike her.—For staying of these suits, sentence being given against him in both, *Wilcocks* prays to have several prohibitions.

The wife and daughter of a principal at *Oxford* may sue a scholar in the court of the vice-chancellor there for assault and defamation, for they have no remedy against him in any other court, and therefore he cannot disclaim this privilege. *Vide post.* 87.

And now the agent for the university moved for a consultation, and shewed the charters of the university of the 14. *Rich.* 2. and the 14. *Hen.* 8. whereby is granted to them, that they may inquire of all trespasses, injuries, and of all pleas and quarrels, and of all other crimes and matters (except pleas of franktenement), where a scholar or their servants or ministers "*sunt una partium, et cognitionem et correctionem inde habend. secundum eorum statuta vel consuetudines, vel secundum legem regni nostri ANGLIÆ, ad voluntatem cancellarii; ita quod justiciarii de banco regis sive de communi banco, vel justiciarii de assisis, non se intromittant. Et si iidem justiciarii inquirere, seu aliquo modo cognoscere, seu intromittere perstrinxerint, tunc super certificationem, notificationem, seu significationem cancellarii universitatis seu ejus commissarii, inquisitionem seu cognitionem hujusmodi supersedeant, nec partes ad respondendum coram eis ponant, sed pars illa coram cancellario seu commissario suo solummodo castigatur et puniatur in formā prædictā;*" and that these charters were confirmed by act of parliament, 13. *Eliz.* c. 29. (and so were recited *verbatim* in the act): and because *Wilcocks* was a scholar and master of arts of the said university, it was prayed that the cause might be remanded.

Year-book, 8. *Hen.* 4. pl. 20. 2. *Inst.* 548. 4. *Inst.* 227. *Hetley*, 25. *Jenk. Cent.* 2. pl. 88. *Hardres*, 189. 504, 505. *Godbolt*, 201. *Hale's Com. Law*, 33. 2. *Ld. Raym.* 836. 1364. 10. *Mod.* 126. 2. *Vent.* 363. *Hob.* 57. 1. *Bl. C. Intro.* ii. 3. *Bl. Com.* 84. 300. *Wood's Inst.* 521. 5. *Bac. Abr.* 328. 1. *Vern.* 212. 2. *Vern.* 484. *Abr.* 327.

It was much debated at the bar and bench, for that the parties plaintiffs were women, who were not any persons privileged there, and the defendant who is the scholar doth not desire that privilege, but would oppose it, and prayeth these prohibitions.

*Stra.* 810. 2. *Will.* 406. 5. *Com. Dig.* 611. *B. R. H.* 241. 5. *Bac. But*



WILCOCKS  
against  
BRADDELL.

BUT THE COURT agreed, forasmuch as the charters are, that the university shall have cognizance of those pleas where "*una pars est scholaris*;" and so the plaintiff's being thereby enforced to sue there, therefore the cause should be remanded.

## CASE 2.

An attorney struck off the roll and imprisoned for suing a *capias* in debt without an original.

20. Hen. 6. pl. 37.  
2. Inst. 215.  
Litt. Rep. 46.  
4. Inst. 101.  
Moor, 882.  
1. Brown. 44.  
Sti. P. Reg. 3.  
1. Bac. Abr. 192.  
3. Term Rep. 275.  
Cowp. 829.

If an attorney falsify or forge a writ, he shall be struck off the roll and fined.

Cro. Jac. 694.  
4. Mod. 367.  
1. Burr. 20.

## Jerome's Case.

**M**EMORANDUM this Term. Because one Jerome, an attorney, had prosecuted three several actions of debt, every one of them being above the sum of forty pounds, and so finable to the king; and procured judgments to be entered upon them, no original writs being sued forth, he himself having received the charges for suing the originals, as well for the fine to the king as for the said writs (as he himself confessed upon his examination); and because it was done voluntarily, in deceit of the king for his fines, and against his oath as attorney that he should not practise any deceit, it was ordered, that he should be put out of the roll of attornies, and be cast over the bar and committed to the Fleet; but no fine was imposed upon him, *quia pauper*; and in THE YEAR-BOOK, 20. Hen. 6. fol. 37. there is the like judgment; and it was forthwith put in execution accordingly.

1. Com Dig. 447, 448. Dougl. 114.

A PRECEDENT was shewn, which was entered in the roll 30. Eliz. that one Osbaston, an attorney, for falsifying and forging a writ of *capias*, was ordered to be put out of the roll, and cast over the bar, and fined five pounds, and sworn never to practise after as attorney, and to be brought to the king's bench bar and exchequer, that knowledge might be taken of him that he was not to practise any longer as attorney in those courts.

2. Burr. 797. 1. Com. Dig. 447. 2. Hawk. 219.

See St. W. 1. 3. Edw. 1. c. 29. and 3. Jac. 1. c. 7. 12. Geo. 1. c. 29.

## CASE 3.

## Turner against Palmer.

A *quare impedit* may be amended before appearance, by the original instructions given by the plaintiff's attorney to the curfitor.

2. Roll Abr. 198.  
8. Co. 159.  
2. Vent. 46.  
1. Lev. 2.  
Barnes, 4. 12.  
16. 27.  
1. Com. Dig. 317.  
1. Bac. Abr. 97.  
2. Hawk. P. C. 278.  
Cowp. 841.  
Dougl. 115.

**Q**UARE IMPEDIT *ad præsensandum ad ecclesiam de WATTON*, and before appearance of the defendant it was moved, that the writ might be amended, for his title of presentation is to the vicarage of the said church, and not to the parsonage. And because it was in a writ original, and in point of substance, THE COURT much doubted whether it should be amended; for it is clear the writ was mistaken; for the words "*ad præsensandum ad ecclesiam*" always intend right of *advowson of the parsonage*, but when the title is to the vicarage only, there is a special writ *ad præsensandum ad vicariam*. Fit. Nat. Brev. 32. & Dyer, 323. But because GAY, the attorney, gave a note to the curfitor of the chancery to draw a writ *ad præsensandum ad vicariam ecclesie de WATTON*, and because it is a peremptory action in a *quare impedit*, the six months being past, the party being a purchaser of the advowson, and that imprisonment happening by the fault of the clerk, who did not pursue his master's direction, it was ordered that it should be amended; and the curfitor, being present in court, was appointed to amend it.

135. 378. 1. Term Rep. 782. 3. Term Rep. 349. 749.

Whiteacres

**Whiteacres against Hamkinson.**

CASE 4

Hilary Term, 2. Car. 1. Roll.

**D**EBT upon an obligation with condition to pay a hundred pounds. The defendant pleads, That one *John Woodcock* was bound with him jointly and severally in the said bond, and that the plaintiff recovered against him, and had him in execution upon a *capias ad satisfaciendum*, and that such a sheriff *libere & voluntarie* permitted him to go at large; *et hoc, &c.* It was hereupon demurred.

If one obligor be in execution and the sheriff suffer him to escape, the obligee may sue the other obligor, notwithstanding he has remedy against the sheriff.

And being moved, it was, without argument, **ADJUDGED** for the plaintiff; for an execution against one is no bar but that he may sue the other; for execution without satisfaction is not any bar: and although he escaped by the voluntary permission of the sheriff, as is pleaded, so as the plaintiff is entitled to an action against the sheriff, yet that shall not deprive him of his remedy against the other obligor; but if he had pleaded, that the sheriff suffered him to go at large by the licence or command of the plaintiff, it had been a discharge, and might have been pleaded in bar.

Post. 1106. 153. 240. 255. 5. Co. 86. b. Hobart, 60. Cro. Eliz. 478. 555. 373. 850. Cro. Jac. 143. 338. 332. Moor, 459. Dig. 310.

1. Com. Dig. 115. 3. Com.

**Thorowgood and Jacques against Collins.**

CASE 5.

**TRESPASS.** Upon demurrer the case was, That one *Dobson* devised the land in question to the two plaintiffs, and to four other persons, *HABENDUM* to them, their heirs and assigns, *in perpetuum, et quod eorum omnes haberent equalem et consumilem partem, ANGLICE*, "part and part-like, and every of them to have as much as the other." The question was, Whether this were a joint-tenancy or tenancy in common? The defendant claimed by devise under one of the devisees.—And, without argument, **IT WAS ADJUDGED**, that by reason of these words, "part and part-like," and being devised "to them, their heirs and assigns," and being in a will, it was a tenancy in common, not a joint-tenancy, and that the defendant had good title. Wherefore it was adjudged for the defendant.

A devise to two and their heirs, part and part alike, creates a tenancy in common, and not a joint estate. Hetley, 29. Dyer, 25. 326. Co. Lit. 190. b. Cro. Jac. 259. Cro. Eliz. 330. 443. 696. 1. Leon. 258. 3. Co. 39. b. Moor, 594. 1881. 1895.

2. Roll. 89. 2. And. 17. 3. Com. Dig. 34. 2. Atk. 441. 1. Vezey, 165. 3. Burr. See the Case of *Fisher v. Wigg*, 1. Peere Wms. 14. and 3. Bac. Abr. 196. Cowp. 352. Rep. 596.

CASE 6.

**Eve against Wright.**

Hilary Term, 1. Car. 1. Roll 732.

**REPLEVIN.** The defendant made cognizance as bailiff to *Lord Peters*, because *Lord Peters* was seised in fee of the manor of *Writtle*, and he and all those whose estate, &c. have had within the said manor a *LEET* of all the resiants in *Writtle semel in anno*, viz. upon the *Monday* next after the Feast of *Pentecost tenendum*, and all ameracements in that leet for not coming; and that the plaintiff was amerced, and for the said amercement the distress was taken; and issue being joined upon this prescription, the jury at the bar found this special verdict:

A verdict in replevin finding the special matter as the avowant had pleaded, is good; and subsequent matter shall be rejected as surplusage.

F 4

That

EVE  
against  
WRIGHT.

That Lord Peters and all they whose estates, &c. have had a leet, &c. *verbatim ut supra*. But further they find, that the warden and scholars of New College in Oxford are seised in fee of the manor of the rectory of Writtle, called Romans fee in Writtle; and that they and all those whose, &c. have had A VIEW OF FRANK PLEDGE of all the inhabitants and resiants within the said manor called ROMANS FEE, *semel in anno, in Festo Commemorationis PAULI tenendum secundum antiquam consuetudinem ibidem*, as to their manor of Romans belonging; and that the plaintiff was a resiant within the said manor; and if *super totam materiam, &c.*

There may be a superior leet at which the resiants of an inferior leet are bound to attend.

13. *Edw. 1. pl. 7.*

21. *Edw. 3. pl. 18.*

18. *Hen. 6. pl. 12.*

Cowp. 14. 2.

If the jury find a direct verdict,

uncertain or contradictory matter afterwards added

shall be rejected

Co. Lit. 227.

1. Sid. 27. 96.

The point intended was, Because the plaintiff was a resiant within the leet of The College, Whether he may be said a resiant within another leet, and so chargeable to two leets? and, Whether one may have a grand leet of all the inhabitants within a vill, and another may have an inferior leet of some of the inhabitants within the same vill, so as they shall be subject to two leets? was the question.

Co. Ent. 506. Metley, 21. Gro. Jac. 551. 584. 1. Roll. Abr. 541. 4. Com. Dig. 160. Hawk. P. C. 114.

But ALL THE COURT held, that forasmuch as the verdict had found the issue *verbatim* to be precisely for the avowant as he pleaded, the finding of the other matter after is not material, but idle; and judgment to be given for the avowant. So the matter in law was never debated by the justices.

as surplusage.—Post. 130. 174. 212. 2. Roll. Abr. 695. 1. Leon. 92. Moor, 431.

Hob. 54. Ray. 204. Cro. Eliz. 480. 2. Saund. 308. Savil, 312. 3. Leon. 80.

1. Sid. 27. 96. B. R. H. 252. Dougl. 667. 1. Term Rep. 141. Wood's Inst. 481. 2. Hawk. c. 11. f. 3.

#### CASE 7.

#### Chapman against Chapman.

In the Exchequer Chamber.

Trinity Term, 2. Car. 1. Roll 483,

TO A PLEA of performance to DEBT on bond for breach of covenants, A REPLICATION of non-payment of rent, without stating a demand, is good; for a denial of such demand would have been a departure from the plea.

1. Roll. Abr.

443. 460.

Hutt. 90.

1. Lut. 609.

Hob. 8.

Cro. Eliz. 829.

Co. Lit. 304.

Cro. Jac. 145.

423.

Plowd. 105.

5. Com. Dig.

430.

ERROR in the exchequer chamber of a judgment in debt in the king's bench, upon an obligation of two hundred pounds, conditioned "that if the obligor should at all times well and truly pay, perform, and keep all and singular the rents, covenants, grants, articles, payments, and agreements, which on his part are and ought to be performed," comprised in such an indenture of lease, &c. that then, &c. The defendant pleaded generally performance of all covenants, &c. The plaintiff replies, and shews a breach for non-payment of the rent at such a time, but doth not shew any demand of that rent; and thereupon the defendant demurred; and it was adjudged for the plaintiff.

And now the defendant assigneth for error, That forasmuch as the condition of the bond is general for the performance of all the covenants, and not particularized for the payment of the rent, the rent is not payable without demand, and therefore the breach was not well assigned; and for that THE YEAR-BOOKS of 14. *Edw. 4. pl. 4. & 22. Hen. 6. pl. 52.* were cited.

But ALL THE JUSTICES AND BARONS bend, That the judgment is well given; for he pleading performance of the payments, covenants, and agreements, it shall be intended he had really performed them, and so had paid all the rents; and when the plaintiff replies, that he hath not paid such a rent, he need not alledge a demand, for the defendant



defendant may not say it was not demanded; for then it should be a departure from his plea; wherefore they held the replication was good: and yet the obligation being general for performance of covenants, doth not alter the nature of the rent, but that it ought to be demanded; and upon this reason a case was cited of *Specot v. Sheers* (a) in the common pleas. And the judgment was affirmed.

CHAPMAN  
against  
CHAPMAN.

(a) Cro. Eliz. 828. Hutton, 91. Moor, 636.

**Rolte against Sharp.**

CASE 2.

**In the Exchequer Chamber.**

**E**RROR in the exchequer chamber of a judgment given in an *assumpsit* in the king's bench, where the plaintiff declared, That he, at the request of A. S. made a gown and petticoat for the said A. S. which lay by him, because they were not paid for; that the defendant, in consideration the plaintiff would deliver to the said A. S. the said gown and petticoat, assumed and promised to the plaintiff that he would pay as much as the gown and petticoat were reasonably worth; alledging in fact, that he upon that promise delivered the said gown and petticoat to the said A. S. and that there it was reasonably worth fifteen pounds, and that he had requested the defendant to pay it, and he had not paid it.

Delivery of goods to a third person at the defendant's request is a good consideration; and an allegation that he promised to pay *tantum quantum meruit*, with an averment *quod meruit tantum*, is sufficiently certain, without saying to whom.

The defendant pleads *non assumpsit*; and found against him, and judgment for the plaintiff.

And now error assigned, That the declaration is insufficient, because it is alledged he promised to pay, and he doth not shew to whom he should pay it; so it is uncertain to whom the payment should be made.

Latch. 151. 272.  
Noy, 83.  
Poph. 181.  
Ante, 19. 70.  
Cro. Jac. 263.  
570.  
Post. 160. 273.  
573.  
Cro. Eliz. 143.  
149. 848.  
1. Sid. 306.  
Raym. 123.  
2. Wils. 309.  
1. Burr. 373.  
1. Com. Dig.  
p. 137. 142.  
152.

SECONDLY, There is not any consideration for the defendant to be charged; for he hath not any benefit by the delivery to A. S.

THIRDLY, He doth not alledge that he delivered them to A. S. to her own proper use; and then the delivery to her is not material.

FOURTHLY, The promise to pay for them *tantum quantum*, &c. is insufficient.

But ALL THE JUSTICES held that the declaration is good: for as to the first, that he promised to the plaintiff to pay, although he doth not say to whom he should pay, it is good enough; for it shall be intended to the plaintiff, and to pay to another is idle; for the plaintiff made the clothes, and the promise was to him to pay; therefore it shall be intended to be paid to him; as in 4. Edw. 4. obligation *solvendum* to the obligor is idle, and shall be in law a good obligation to the obligee.

TO THE SECOND, That the consideration is good; for the delivery of those garments out of his hands at the defendant's request is a good and valuable consideration.

TO THE THIRD, That the delivery to A. S. at his request is a very good consideration (a).

TO THE FOURTH, It is the usual way to lay down in certainty, viz. that he should pay for it *tantum quantum meruit*, &c. and then to aver what it is reasonably worth; which being the common course, and always allowed, judgment was therefore affirmed.

(a) See 29. Car. 2. c. 3.

## CASE 9.

## Purcase against Jegon.

## In the Exchequer Chamber.

In debt, plea of  
payment on an  
impossible day;  
verdict of non-  
payment on that  
day nor any time  
before, is good.

Ante, 25. 54.

S. C. Noy, 85.

S. C. Jones, 140.

S. C. Latch, 158.

R. 586.

2. C. 5. a.

Co. Lit. 41. b.

1. Bac. Ab. 104.

4. Bac. Ab. 59.

60. 128.

Cowp. 671.

2. Term Rep.

28.

3. Term Rep.

531.

**D**EBT upon an obligation of two hundred pounds, conditioned for the payment of one hundred pounds upon the one-and-thirtieth day of *September* following. The defendant pleaded payment the said one-and-thirtieth day, according to the condition of the bond; and issue thereupon, and found that he did not pay; and costs and damages assessed, and judgment given for the plaintiff; and error brought in the exchequer-chamber.

The error assigned was, Because the verdict being upon the payment on the one-and-thirtieth day of *September*, is an idle and void issue, and so a void verdict; and then the judgment being given upon the verdict, is ill: but the plea of the defendant is ill, and judgment ought to have been given upon that and not upon the verdict.

*Sed non allocatur*: for there being no such day as the one-and-thirtieth day of *September*, and the jury finding that the money was not paid upon that day, nor any time before, they find in effect it was never paid; which is a good verdict, and judgment well given thereupon. And therefore judgment was affirmed.

Michaelmas

3. Car. 1. In the Common Pleas.

Sir Thomas Richardson, *Knt.* Chief Justice.

Sir Richard Hutton, *Knt.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt.* Attorney General.

Sir Richard Sheldon, *Knt.* Solicitor General.

Justices.

Clapham's Case.

CASE I.

**NOTE.** Upon information to the Court that a *habeas corpus* being awarded to the court of *Guilford* in *Surry* to remove a cause there depending, they notwithstanding proceeded. Upon examination it appeared, that the writ was delivered after the issue joined in *DEBT*, viz. *per minas* pleaded, and that the issue was joined more than six weeks after the action brought, so as by the 21. *Jac. 1. c. 23. s. 2.* (a) the judge might refuse.

IT WAS RESOLVED by all the Court, because it was in an action of debt upon an obligation of two hundred pounds not made within that vill, that the statute doth not extend to this case; for that provides against the removing by *habeas corpus* such actions only where the cause of suit is properly arising within the vill.

SECONDLY, Forasmuch as the proceedings were before one who was town-clerk and attorney of the common pleas, and not an utter barrister (as he ought to be by an express proviso in the statute, and such utter barrister ought to be there present, and cannot have a deputy, but such one as is an utter barrister and present at the trial), IT WAS RESOLVED, that after the *habeas corpus* delivered the said proceedings, were ill, and not warranted by the statute; and their proceedings, after a *habeas corpus*, to trial and judgment were also void.

point See also 2. *Burr.* 758. *Tidd's* Practice, 177.

Whereupon a *superfedeas* was awarded: and the judges of the king's bench, being informed thereof, agreed, that their courle in the king's bench was to disallow proceedings in an inferior court after an *habeas corpus* delivered, unless it were a cause arising in the vill or corporation.

If an inferior court proceed after *habeas corpus*, a *superfedeas* shall issue. 3. *Mod.* 85. 1. *Term Rep.* 279.

3. *Com. Dig.* 459 2. *Hawk. P. C.* 418. 1. (a) See 21. *Jac. 1. c. 23.* 12. *Geo. 1. c. 29. f. 3.* and 19. *Geo. 3. c. 70. f. 6.*

Oxford against Rivett.

CASE 2.

Trinity Term, 2. Car. 1. Roll 1684.

**SCIRE FACIAS** against Katherine Rivett, administratrix of John Rivett, upon a judgment against the defendant as administratrix, for a debt due by the intestate.

To scire facias against an administratrix, the defendant pleads

*ipse administravit* at a particular time. The plaintiff replies, that at that time "devastavit diversa bona," without naming the administratrix. The defendant rejoins "quod ipse non devastavit, &c." On issue joined, and verdict for the defendant, she shall have judgment. *Polt.* 92, 93 — *S. C. Hetl.* 33. *S. C. Lit.* 388. *1. Roll. Abr.* 908. 910. *Co. Lit.* 89. b. *Dougl.* 452. 1. *Term Rep.* 388.

The



OXFORD  
against  
RIVETT.

The defendant pleaded, that the intestate made his will, and thereby constituted *Edward Rivett* his son within age his executor, and that administration was committed to her *durante minore etate*, and that he on such a day attained the age of seventeen years, and then refused to be executor, and the administration was committed to *Sir Hugh Wirrell*; and that at the time that *Edward Rivett* came to the age of seventeen years, she had fully administered all the estate which came to her hands, &c.

The plaintiff replies, that at the time the said *Edward* came to his full age, *devastavit diversa bona* of the intestate's, *unde satisfecisse potuit* to him his due debt.

The defendant rejoins, *quod ipsa non devastavit aliqua bonorum, &c. et de hoc ponit, &c. et prædictus querens similiter.*

Upon this it was tried, and found for the defendant.

It was now alledged in arrest of judgment, that here is not any issue joined, and therefore it is a mis-trial not aided by any statute: for in the replication he doth not alledge that *KATHERINA devastavit*, but that *devastavit*; and *Katherina* is not named but by a parenthesis.

Ante, 64.  
Cro. Jac. 67.  
4. Bac. Ab. 57.

*RICHARDSON*, Chief Justice, *HUTTON*, and *HARVEY*, conceived it should be construed, that *KATHERINA devastavit*, for she was the administratrix; and the other by intendment could not make the devastation. And the replication is, that *devastavit diversa bona, unde satisfecisse potuit* the plaintiff of his debt, which is a strong intendment that the *devastavit*; and it shall be a good intendment to aid it after verdict. And she in the rejoinder saith, *quod ipsa KATHERINA non devastavit, et de hoc ponit se super patriam, et querens similiter*: and hereupon a verdict was given, which the plaintiff shall not avoid by an exception to his own replication.

Co. Lit. 126. a.

But *YELVERTON* and I held, that an intendment shall not make a replication good; and an issue cannot be joined but where there is a direct affirmative and negative: but here is no direct affirmative *quod devastavit*; and the Court shall not intend it to be *Katherine* more than another; and it may be that *Edward Rivett* the executor *non devastavit*: but *quæcunque viâ data*, the Court by intendment shall not aid it where there is no issue joined; and the verdict cannot help it (a).

(a) It was moved again on another day in the Term, and judgment given for the defendant. Post. 93, 94.

### CASE 3.

*Fawkeners against Bellingham.*

Michaelmas Term, 22. Jac. 1. Roll 490. SUSSEX.

The statute of 32. Hen. 8 c. 2. limiting an avowry or countenance for rent, suit, or service, to a possession of forty years next before making the avowry, &c. does not extend to a new rent created by act of parliament. Vide S. C. post. 214. Hetley, 28. 36. Jones, 233. Lit. Rep. 42. 2. Vernon, 255. 2. Inst. 95. Co. Lit. 115. a. Moor, 44. 3. Keb. 366. 394. Vent. 265. 2. Vernon, 235. 5. Com. Dig. 335. 532.

**R**EPLEVIN of the taking of three oxen, upon the 3d September, 20. Jac. 1. at *East-Grinstead*, in a place called *Horse-Shu-Meadow*. The defendant makes countenance, as bailiff to *Sir Henry Compton* and *John Blund*, for that the place WHERE was ten acres of meadow, *quodque diu ante tempus quo, &c. ultimus presbyter celebrando divina in ecclesiâ de East-Grinstead* was seised in fee of a messuage called *Boyles*, and of 100 acres of land, 40 acres of meadow, and 30 acres of pasture, in *East-Grinstead* aforesaid, whereof the place does not extend to a new rent created by act of parliament. Vide S. C. post. 214. Hetley, 28. 36. Jones, 233. Lit. Rep. 42. 2. Vernon, 255. 2. Inst. 95. Co. Lit. 115. a. Moor, 44. 3. Keb. 366. 394. Vent. 265. 2. Vernon, 235. 5. Com. Dig. 335. 532.

WHERE,

FAWKENERS  
against  
BELLINGHAM.

WHERE, time whereof, &c. and of all the time, &c. was parcel in *jure presbyteratus sui*, and held them of Lord Windsor and John Sherry, as of their manor of Brambleton, in the county of Sussex, by fealty and rent of eighteen shillings and four broad arrows annually at Michaelmas to be paid, and suit of court and heriot; of which services the said Lord Windsor and John Sherry were seised by the hands of the said last presbyter, as by the hands of their veray-tenant; and being thereof so seised, the said last presbyter continued his possession until the statute 1. Edw. 6. c. 14. of chantries (a): and shews the statute, with the saving of all rents, suits, and services, whereby the king was seised in fee of the tenements unde, &c.; and that the said king, in the fourth year of his reign, granted them to Thomas Reve and others, whose estate one John Cornford now hath; and that the said Lord Windsor and John Sherry were seised in fee of the said manor of Brambleton, before the said statute and after; and that after the said statute, viz. in 5. Eliz. they infeofed one Pickering of the said manor and rent, and so by divers mean conveyances the same manor came to the hands of the said Sir Henry Compton and John Blund, in the fourteenth year of James the first; and for the rent of eighteen shillings for one year behind, at Michaelmas, 20. Jac. 1. he made consuance as bailiff to them, as in land chargeable to their distrels, for the said rent in forma prædicta; and avers, that presbyteratus prædictus fuit in esse within five years before the statute of 1. Edw. 6. c. 14.; and makes divers other averments, that the lands were within the statute, and that they were within the saving of the statute.

The plaintiff in bar of the consuance pleads *protestando*, that the said priest "*non tenuit*;" and *protestando* to all the mean conveyances, "*pro placito dicit*," that the said Sir Henry Compton and the said John Blund, *nec aliquis alius*, whose estate they have in the said manor, were seised of the said rent within forty years *ante tempus quo*, &c.

Thereupon it was demurred; and this case was oftentimes argued at the bar and bench.

The sole question was, Whether this rent be within the statute of 32. Hen. 8. c. 2. of limitations (b)? for if it be, then no *seisin* being had within forty years (as is confessed by the demurrer), he is to be barred of that consuance.

YELVERTON, HUTTON, and RICHARDSON, *Justices*, argued for the defendant, that although it be a rent within the words of the statute, yet it is out of the intent of the statute; for the statute extendeth only to rents services, and rents by prescription; but rents which begun by deed within time of memory were created *quasi* by an act of parliament, and so (their beginning known) are out of the intent of the statute; for that intended only such rents whereof *seisin* ought to be alledged in an avowry; and being alledged shall bind the party, unless there be a traverse: and when *seisin* is alledged it is but formal, and not the substance; as it is where an avowry is made of a rent created by deed, or reserved by grant within time of memory, although *seisin* be there alledged;

5. Co. 65. a.

F. N. B. 11. c.

(a) Cro. Jac. 51. Hob. 123. Moor, 865. 1. Leen. 38. Lane, 113. 115. Dyer, 81. 1. Roll. 152. 417. 2. Roll. 160. Goldsb. 93. 467. 252. Styles, 36. 82. 1. Bullst. 120. 3. Bullst. 151. (b) Sec 1. Mary, c. 5. and 21. Jac. 1. c. 16.

yet

FAWKNER:  
against  
BELLINGHAM.

Plowd. 95.

3. Com. Dig.  
528. 532.

Co. Lit. 153. a.

yet it is not traversable, but the deed only which is the title, as it is held in *Sir William Foster's Case* (a), and *Loseild's Case* (b): so rent created made by act of parliament, the beginning thereof being by the act, that is his title, and the *seisin* is not material: and although the said rent were a rent-service yet by the construction of the act of 1. *Edw.* 6. c. 14. it is turned into a rent-secck; and the beginning of that turning being known, it is therefore as a rent created by parliament.

YELVERTON and HUTTON called it a rent coming out of the womb of the parliament, and therefore no time to have *seisin* thereof within forty years, for the statute preserves it to him; and as he hath loss thereby as lord, that he cannot have escheats and other profits which a lord hath, so hath he benefit, that *laches* of time or *seisin*, although an hundred or two hundred years, shall not prejudice him; and therefore compared it to the case of a rent-charge by deed, or a rent granted upon equality of partition, in an avowry for them; although *seisin* be alledged, yet it is not material nor traversable, nor is it of necessity to alledge it; and this statute of 1. *Edw.* 6. c. 14. taking away the seignory, the rent, which is the fruit, ought to be construed as liberally and beneficially as may be; and this avowry is grounded upon the statute of 1. *Edw.* 6. c. 14. which he shews in his avowry, and therefore is out of the statute of limitations, which extend to avowries at the common law. But they agreed, that it is the same rent in estate as it was before, *viz.* if it were an estate for life, the remainder over, so it shall be now; and if it were descendible on the part of the mother, so it shall now descend in the same manner: but it is altered in quality, for it is turned into a rent-secck, and the beginning thereof being known, is therefore out of the statute, *id est*, out of the intent of the statute, although not out of the words; and compared it to the case where confirmation is within time of memory to hold by ten shillings rent, whereas before he held by twenty shillings rent, although there were not any *seisin* of this rent within forty years, yet it is out of the statute; as if judgment be in a *per quæ servitia*, such rent is out of the statute, because there is a record thereof; so forasmuch as this rent is turned into a rent-secck by the parliament, it is out of the statute.

But it was argued by HARVEY and MYSELF to the contrary, that this is within the statute; for the statute extends to all rents, suits, and services, so it is within the words: and we also conceived it to be within the intent; for although it be a new rent-secck, and was before a rent-service, and the time of the alteration thereof is known, yet because the beginning of the creation of this rent is unknown, and it is the same rent it was before (for it is parcel of the manor as before), as 31. *Aff.* 23. which proves that it is an ancient rent, time whereof memory, &c. and also the *seisin*, before it was turned into a rent-secck, is sufficient to have an assise, as *Bevill's Case* (c); and therefore the rent being an ancient rent is distrainable of common right. And that this is not a new rent, made or created by the 1. *Edw.* 6. c. 14. appears by this, because the statute saves only all ancient rents, &c.; and by construction of

(a) 8. Co. 94.

(b) 10. Co. 108.

(c) 4. Co. 9.



FAWKNER  
against  
BELLINGHAM.

law this shall be taken to be and saved to the lord as a rent-sock, because the king cannot be a tenant nor hold of any, as the tenant before did (a). And this rent is not as a rent given by the statute; for a saving in an act of parliament is no giving of any new thing, unless in some special case being a saving of that which was in *esse* before, and it is *quasi* an exception or foreprise out of the statute; as it is held *Plowd.* 563. 35. *Hen.* 6. 34. 26. *Aff.* 66. 8. *Edw.* 3. 67. 9. *Edw.* 3. 27. *Hen.* 8. title "Parliaments," 77. So this saving being general doth not give this rent, but is a saving of it out of the statute, where otherwise it would have been extinguished and lost; for every one is intended to give all their rights in such lands *Post.* 101. or rents issuing out of the same, but only such as are saved thereby: so the statute doth not give nor make any new thing by the saving, but saves that which before was in being, and so it is the same rent. And this is proved by the averment, that he had such rent before; so it is not to be compared to a rent made or created by a deed or record within time of memory; for this is a rent whereof the beginning is not known, and therefore of necessity seisin must be alledged thereof in an avowry. And this *seisin* is always traversable; for in an avowry the *seisin* is the principal matter which ought to be alledged, and it shall be traversed; as it is held in 9. *Co.* 34. 36. a. *Co. Lit.* 268. b. *Bucknall's Case*, 27. *Hen.* 8. 4. & 20. 34. *Hen.* 8. "Averment," 113. *Pl. Com.* 95. a. and *seisin* alledged ought to be confessed and avoided, as by coercion of distress, or traversed; and a traverse shall never be of a seisin generally, but ever of a seisin within time of limitation, as the books are, *Dyer*, 107. 315. 8. *Co.* 64. *Warren's Case*, cited in *Foster's Case*, 10. *Hen.* 6. 6. *Keilw.* 13. *Hen.* 7. 31. 21. *Hen.* 7. 7. *Dyer*, 330. And whereas it was affirmed, that seisin should not be alledged or traversed, because the rent is changed within time of memory, that cannot be a reason; for then when the lord purchaseth the tenancy or *mesnalty*, he shall have a surplussage of the services, which are notwithstanding distrainable of common right, as the book 2. *Edw.* 3. "Extinguishment," 1. 20. *Edw.* 3. "Avowry," 126. and therefore it is against law that the lord should be bound in that case to any time of seisin. And this statute of limitations is favourably to be expounded, to repress the mischiefs, and not to be enlarged in time further than the statute appoints, as *Plowd.* 371. *per CATIM* in *cases of fines*, which is the reason there given that copyholds are within that statute; and it being within the mischief and remedy intended by the statute, ought to be construed according to the rules in 3. *Co.* 7. *Heydon's Case*. Wherefore they concluded for the plaintiff, *Ante*, 453

Bue by reason of the opinion of THE OTHER THREE JUSTICES, judgment was given for the defendant.—But afterwards a writ of error being brought in the king's bench upon the point of law, the judgment was reversed, *quod vide postea*, pag. 214.

(a) *Dyer*, 313. 1. *Co.* 47. a. 8. *Co.* 118. b. *Co. Lit.* 1. b. *Plowd.* 212. 6. *Co.* 5. 2. *Roll. Ab.* 513.

FAWENERS  
against  
BELLINGHAM.

Plowd. 95.

5. Com. Dig.  
528. 532.

Co. Lit. 153. a.

yet it is not traversable, but the deed only which is the title, as it is held in *Sir William Foster's Case* (a), and *Loseild's Case* (b): so rent created made by act of parliament, the beginning thereof being by the act, that is his title, and the *seisin* is not material: and although the said rent were a rent-service yet by the construction of the act of 1. *Edw. 6. c. 14.* it is turned into a rent-secck; and the beginning of that turning being known, it is therefore as a rent created by parliament.

YELVERTON and HUTTON called it a rent coming out of the womb of the parliament, and therefore no time to have *seisin* thereof within forty years, for the statute preserves it to him; and as he hath loss thereby as lord, that he cannot have escheats and other profits which a lord hath, so hath he benefit, that *laches* of time or *seisin*, although an hundred or two hundred years, shall not prejudice him; and therefore compared it to the case of a rent-charge by deed, or a rent granted upon equality of partition, in an avowry for them; although *seisin* be alledged, yet it is not material nor traversable, nor is it of necessity to alledge it; and this statute of 1. *Edw. 6. c. 14.* taking away the seignory, the rent, which is the fruit, ought to be construed as liberally and beneficially as may be: and this avowry is grounded upon the statute of 1. *Edw. 6. c. 14.* which he shews in his avowry, and therefore is out of the statute of limitations, which extend to avowries at the common law. But they agreed, that it is the same rent in estate as it was before, *viz.* if it were an estate for life, the remainder over, so it shall be now; and if it were descendible on the part of the mother, so it shall now descend in the same manner: but it is altered in quality, for it is turned into a rent-secck, and the beginning thereof being known, is therefore out of the statute, *id est*, out of the intent of the statute, although not out of the words; and compared it to the case where confirmation is within time of memory to hold by ten shillings rent, whereas before he held by twenty shillings rent, although there were not any *seisin* of this rent within forty years, yet it is out of the statute; as if judgment be in a *per quæ servitia*, such rent is out of the statute, because there is a record thereof; so forasmuch as this rent is turned into a rent-secck by the parliament, it is out of the statute.

But it was argued by HARVEY and MYSELF to the contrary, that this is within the statute; for the statute extends to all rents, suits, and services, so it is within the words: and we also conceived it to be within the intent; for although it be a new rent-secck, and was before a rent-service, and the time of the alteration thereof is known, yet because the beginning of the creation of this rent is unknown, and it is the same rent it was before (for it is parcel of the manor as before), as 31. *Aff. 23.* which proves that it is an ancient rent, time whereof memory, &c. and also the *seisin*, before it was turned into a rent-secck, is sufficient to have an assise, as *Bevill's Case* (c); and therefore the rent being an ancient rent is distrainable of common right. And that this is not a new rent, made or created by the 1. *Edw. 6. c. 14.* appears by this, because the statute saves only all ancient rents, &c.; and by construction of

(a) 8. Co. 94.

(b) 10. Co. 108.

(c) 4. Co. 9.

law this shall be taken to be and saved to the lord as a rent-seck, because the king cannot be a tenant nor hold of any, as the tenant before did (a). And this rent is not as a rent given by the statute; for a saving in an act of parliament is no giving of any new thing, unless in some special case being a saving of that which was *in esse* before, and it is *quasi* an exception or foreprise out of the statute; as it is held *Plowd.* 563. 35. *Hen.* 6. 34. 26. *Aff.* 66. 8. *Edw.* 3. 67. 9. *Edw.* 3. 27. *Hen.* 8. title "Parliaments," 77. So this saving being general doth not give this rent but is a saving of it out of the statute, where otherwise it would have been extinguished and lost; for every one is intended to give all their rights in such lands *Post.* 101. or rents issuing out of the same, but only such as are saved thereby: so the statute doth not give nor make any new thing by the saving, but saves that which before was in being, and so it is the same rent. And this is proved by the averment, that he had such rent before; so it is not to be compared to a rent made or created by a deed or record within time of memory; for this is a rent whereof the beginning is not known, and therefore of necessity seisin must be alledged thereof in an avowry. And this *seisin* is always traversable; for in an avowry the *seisin* is the principal matter which ought to be alledged, and it shall be traversed; as it is held in 9. *Co.* 34. 36. a. *Co. Lit.* 268. b. *Bucknall's Case*, 27. *Hen.* 8. 4. & 20. 34. *Hen.* 8. "Averment," 113.: *Pl. Com.* 95. a. and *seisin* alledged ought to be confessed and avoided, as by coercion of distress, or traversed; and a traverse shall never be of a *seisin* generally, but ever of a *seisin* within time of limitation, as the books are, *Dyer*, 107. 315. 8. *Co.* 64. *Warren's Case*, cited in *Foster's Case*, 10. *Hen.* 6. 6. *Keilw.* 13. *Hen.* 7. 31. 21. *Hen.* 7. 7. *Dyer*, 330. And whereas it was affirmed, that *seisin* should not be alledged or traversed, because the rent is changed within time of memory, that cannot be a reason; for then when the lord purchaseth the tenancy or *mesnalty*, he shall have a surplussage of the services, which are notwithstanding distrainable of common right, as the book 2. *Edw.* 3. "Extinguishment," 1. 20. *Edw.* 3. "Avowry," 126. and therefore it is against law that the lord should be bound in that case to any time of *seisin*. And this statute of limitations is favourably to be expounded, to repress the mischiefs, and not to be enlarged in time further than the statute appoints, as *Plowd.* 371. *per* CATIM *in casis of fines*, which is the reason there given that copyholds are within that statute; and it being within the mischief and remedy intended by the statute, ought to be construed according to the rules in 3. *Co.* 7. *Heydon's Case*. Wherefore they concluded for the plaintiff. *Ante*, 457

Bue by reason of the opinion of THE OTHER THREE JUSTICES, judgment was given for the defendant.—But afterwards a writ of error being brought in the king's bench upon the point of law, the judgment was reversed, *quod vide postea*, pag. 214.

(a) *Dyer*, 313. 1. *Co.* 47. a. 8. *Co.* 118. b. *Co. Lit.* 1. b. *Plowd.* 212. 6. *Co.* 5. 2. *Roll. Ab.* 513.



## CASE 4.

## Memorandum.

Serjeants at law  
and their ser-  
vants shall be  
impleaded only  
in the common  
pleas, and not  
elsewhere.

2 Inst. 214.

422. 563.

Cro. Jac. 668.

2. Lev. 129.

Ld. Raym. 399.

1. Bl. Com. 24.

3. Bl. Com. 27.

IN the last vacation, a servant to SERJEANT HEADLY usually attending on him was arrested on a process out of the court of THE MARSHALSEA, and thereupon obtained a writ of privilege out of this court, reciting, that serjeants at the law who are attending this Court, and their servants ordinarily waiting on them, ought to enjoy the privilege to be sued in this court; which being delivered to the steward of the said court, he would not allow thereof; supposing serjeants at law ought not to have such privilege for them and their servants, and that he might not be sued by bill filed against him, as 11. Hen. 6. pl. 8. Dyer, 24. Book of Entries, 430, 431.

And now this matter was moved to this Court, that they ought to have the privilege, for they are properly attendant at this bar, and none others are admitted to practise here: and although peradventure it may be doubted, whether he may be sued by bill filed, because there cannot be a *fore judger* against him, yet he may be sued here by original: and precedents were shewn, one, where MARTYN, Serjeant, was arrested in London, at the suit of the Bishop of Winchester, and at the suit of others, and had a writ of privilege, reciting, that serjeants at the law were to be attendant to the said court, *ex officio plus quam alibi*, and that their service was necessary at this bar, and therefore commanded them to surcease, and to prosecute their suits in the common pleas.

WHEREUPON it was allowed, and the party discharged of the suit in the court of Marshalsea.

Hilary Term,  
26. & 27. Car. 2.  
In B. R.

A copy of the record and writ produced was as followeth:

“ REX majori et vicecomitibus LONDON, &c. Cum omnes et singuli de curia nostra de banco, in veniendo versus curiam nostram, ibidem morando et exinde versus propria redeundo sub protectione nostra esse debeant, et à totis temporibus retroactis consueverunt, juri convent ipsi, et quibus in eadem curia; Nos de nostris legibus, conservare dignemur exhiberetur pro eisdem nostrum privilegium specialius protegi quietus defendere. Nulli liceat judici seculari placita versus eos mora, nisi in feloniarum appealorum, vel liberi tenementi causis alibi, quam in banco prædicto cognoscere vel tenere; quidam tamen HENRICUS episcopus Wintoniæ, et JOHANNES PODRIDGE, curiæ nostræ prædictæ privilegia, nescientes, nec ingendo, nec indigendo ministerium JOHANNES M. servientis ad legem: qui ex officio incumbit in curia illa potius quam in alia ministrare, præsertim cum eadem curia ulterius gradus personarum, quam servientes ad legem non permittit, diversas debitorum querelas, viz. prædictus episcopus unam super demandum 100l. et prædictus JOHANNES PODRIDGE alteram super demandum de 12l. versus ipsum JOHANNES M. &c. coram vobis præfatis majori tenendas affirmarent, et per certa bona sua per ministros vestros attachiari, contra prædictæ curiæ nostræ privilegium, minus debite procurarent. Vosque præfatus major querelas prædictas coram vobis in curia vestra circiter prædictas summas persistitis terminand. prout ex ipsius J. M. querela accipimus, unde nobis supplicavit sibi per nos de remedio provideri; et quia eidem J. M. fieri, quod est justum, et libertati et privilegio curiæ prædictæ inviolabiliter observari volumus, vobis præcipimus, quod vos præfatus major si querelas prædictas vel earundem alteram sumpseritis, alioquin

“ alioquin vos præfati vicecomites de placitis supersedeatis, querela vel  
 “ earundem alteram coram vobis, et quemlibet vestrum de placitis illis, et  
 “ aliis quibuscunque versus præfatum J. M. quocunque nomine censeatur,  
 “ coram vobis sedente curia nostra de hanc prædicta, motis vel morandis  
 “ supersedeatis omnia. Test. &c.”

NOTE this writ well, that serjeants only shall attend at the common pleas, and shall be impleaded there, and not elsewhere (a).

(a) Sed vide  
 3. Salk. 282.  
 1. Mod. 298.  
 738. contra.

2. Lev. 129. 13. Keb. 424. 4. Mod. 226. Strange.

### Memorandum.

CASE 5.

The ceremony  
 of calling Mr.  
 Serjeant Vernon.

GEORGE VERNON, a reader of the Inner-Temple, received in the time of the last long vacation a writ to be serjeant, returnable *mensē Michaelis*, and thereupon he appeared upon the last day of October, which was the *quarto die post*, in chancery; yet the prothonotary said, that he might have appeared there the first day, or any day before the fourth day. Being sworn in chancery, he had afterward day given him to appear in the common pleas, until the 8th of November, at which day he came in the morning to Serjeants-Inn in Fleet-street, accompanied with the benchers and others of the society of THE INNER-TEMPLE, and there, before the justices of the same house, and LORD RICHARDSON, Chief Justice of the common pleas, the other justices of Serjeants-Inn in Chancery-lane, not being present, he went in attended with the warden of the Fleet and the usher of the exchequer, and there, without any speech made (as the usual course is by chief justice), he recited his COUNT, and after demand of oyer of the writ by one of the serjeants, the writ being read by the chief prothonotary, and DEFENCE made by another serjeant, he kneeled, and his *coif* and *hood* were put on, and he dismissed; and afterward, the same day, went to the common pleas, and was there presented by two of the king's ancient serjeants, and then recited his COUNT; and DEFENCE was made, and the writ read, and he placed in his place of *puisne serjeant*. MR. GEORGE WILD, one of the utter barristers of the Inner Temple, delivered rings for him with this inscription, “*Rex Legis Regnique Patronus*.” Afterwards upon the seventeenth day of November the same Term, he was made one of the barons of the exchequer.

Antc, fol. 67.

BROWNLOW, Chief Prothonotary, shewed me these precedents.

Hob. 68.

1. Brownl 47.

Lovelace against Cocket.

CASE 6.

Michaelmas Term, 6. Jac. 1. Roll 1001.

DEBT upon a bond. The defendant pleaded acceptance of another bond in discharge of the obligation aforesaid, and ruled by THE COURT to be ill.

another bond in satisfaction. Post. 193.—1. Mod. 225. Cro. Eliz. 716. Cro. Jac. 100. 579. 650. Hobart, 68. 86. 6. Co. 44. 1. Brownl. 74. 1. Burr. 9. 2. Com. Dig. 459, 460. See the case of Mease v. Mease, Cowp. 47.

Branthwait against Cornwallis.

CASE 7.

Michaelmas Term, 2. Jac. 1. Roll 3272.

DEBT. He pleaded acceptance of a statute-staple after the day of payment, and it was held no plea.

CRO. CAR.

G

Maynard

## CASE 8.

## Maynard against Crick.

Trinity Term, 41. Eliz. Roll 1409.

Cro. Eliz. 716.  
Co. Lit. 212. b.  
*contra.*

**D**EBT upon a bond. The defendant pleaded acceptance of another bond in satisfaction of the first obligation; and it was ruled by the Court to be no good plea.

## CASE 9.

## Oliver against Lease.

Trinity Term, 14. Jac. 1. Roll 734.

5. Com. Dig.  
256.  
2. Term Rep.  
24.

**D**EBT upon a single bill. The defendant pleaded, that he enfeoffed the plaintiff of such land in discharge of the said bill, which he accepted; and it was held to be an ill plea. *Vide 4. Hen. 3. Dyer, 1. 12. Hen. 4. pl. 23.*

## CASE 10.

## Young against Young.

If an infant be admitted to sue by guardian, and, by the mistake of the clerk, the admission is not entered, the roll may be amended by the judge's notes; for neither the act of the Court, nor the negligence of its officers, shall prejudice a suitor.

Hutton, 92.  
Jones, 177.  
Hetley, 52.  
1. Lev. 224.  
Cowp. 425.  
Dougl. 376 730.  
1. Term Rep.  
783.

**F**ORMEDON IN DESCENDER. After judgment upon a verdict, the record being removed by a writ of error, it was moved to have it amended in the FILAZER'S ROLL, *viz.* "Whereas the defendant was admitted before JUSTICE JONES, in *Easter Term*, 22. Jac. 1. being then justice of the common pleas, to prosecute *in omnibus actionibus*." This was entered in the PLEA ROLL; and on viewing the roll, it was "*quod concessum est per Curiam*, that the defendant, by such a one his guardian, should prosecute, &c.;" and so it is entered in the remembrance. And the filazer's roll is, that "*John Young, by J. S. his guardian, ad hoc admissus per Curiam, obtulit se quarto die, &c.*" But there was no entry in the FILAZER'S ROLL, as is usual in such cases; "*quod concessum est per Curiam, quod petens sequatur per J. S. his guardian.*"

The question was, Whether this may be amended and inserted?

And ALL THE COURT held it might well be amended, notwithstanding the writ of error brought and the record removed; because it appears by the note under JUSTICE JONES's hand, that he admitted "the guardian *ad prosequendum*;" and by the several entries it appears, that "he sued by his guardian:" and the entry in the roll in the filazer's office is, *quod obtulit se*; so the admittance of the guardian appearing to be before the *obtulit*, it is the omission of the clerk, or rather the act of the Court, which did not cause it to be entered in the FILAZER'S ROLL; it ought not therefore to prejudice the party, no more than the not entering of a warrant of attorney, when it appears he hath a sufficient warrant of attorney, which hath oftentimes been used to be entered upon examination of the truth, although a writ of error be then brought. Wherefore by the rule of the Court it was ordered to be amended.

An infant may sue either by guardian or prochein ami.  
Post. 161.

But some doubt was made, Whether admittance to sue by guardian, where it ought to be by *prochein ami*, be good, as it is in *F. N. B.* 27. h.?—But THE COURT delivered no opinion therein, because there were many precedents that such entries had been both ways (a).

(a) See S. C. Jones, 177. where this point of the case is reported at large, and also Cro. Jac. 640. Post. 161. and Mr. Hargrave's note (1) Co. Lit. 135. b.  
5. Com. Dig. 197. 199. Cowp. 128. See

Kirtton's



## Kirton's Case.

CASE 11.

In the Court of Wards.

**NOTE.** Upon an assembly of all the Justices and Barons in *Serjeants-Inn*, in *Fleet-street*, the case was propounded before them by *HYDE*, *Chief Justice*, which had been argued before the two Chief Justices and Chief Baron, being the case of one *Kirton* referred to them out of the court of wards.

A man mortgages upon condition, that if he or his heirs repay one hundred pounds at such a day he shall re-enter: he dies, leaving issue a daughter only, his wife being *priviement enseint* with a son.—The daughter and heir at the day pays the hundred pounds, and afterwards the son is born.

The question was, Whether the son shall enter upon the sister, or if she shall retain it for ever?

*Vide* 1. Co. 95. a. 99. a. *Shelley's Case*, that the daughter who paid the money shall retain it; for *qui sentit onus sentire debet et commodum*. And 9. Hen. 7. 21. by *WOOD*, that if the daughter enter for a condition broken, and afterward a son is born, the son shall not take advantage, &c. because he hath not any right at the time of his entry.

And it was held by *HYDE*, *Chief Justice*, *WALTER*, *Chief Baron*, *DENHAM*, *HUTTON*, *WHITLOCK*, *HARVEY*, *YELVERTON*, and *MYSELF*, *Justices*, that the sister shall retain it against the son born, after performance of the condition: for inasmuch as she paid the money (and if she had not paid it the land had been lost (a)), if she could not retain the land against the son, she hath no remedy for the money; and by payment thereof she hath gained the land, and is in as a purchaser, although she were entitled thereto by the condition, and as heir, and she shall retain it as she shall the *perquisite* of a villain, and as land gained by her vigilancy; for otherwise it should be lost to both, and she should lose both land and money; therefore the law wills that she shall retain the land.

But *RICHARDSON*, *Chief Justice* of the common pleas, and *DODDERIDGE*, held strongly the contrary, because she hath it as heir, and then the nearer heir being born shall defeat it: and it was in her a voluntary act to pay the money, which she might well have omitted; and she paid it of her own head, and at her own peril.—*JONES* and *TREVOR*, *puisne Barons*, doubted thereof, and would not deliver any opinion, but rather inclined that the son should have it (b).

(a) See 7. Geo. 2. c. 20. for the more gages.

(b) *Vide* 10. & 11. Will. 3. c. 16.

## Halley's Case.

CASE 12.

**EJECTMENT** upon a lease of a messuage in *Oxon*. The defendant being principal of *Gloucester-hall*, in *Oxford*, pretended that he being a scholar in *Oxford*, and a privileged person, ought to be sued before the vice-chancellor in *Oxford* according to their course of proceedings there, *secundum morem universitatis*, and according to the charters granted to the universities in the 3. Rich. 2. and the

The university of Oxford cannot claim continuance of an ejectment brought to recover possession of a term.

*Vide* ante, p. 73. Lit. Rep. 252. 5. Bac. Abr. 328.

HALLET'S  
CASE.

14. Hen. 8. and confirmed by parliament in the 13. Eliz. c. 20, wherefore he prayed there might be a stay of the proceedings in this court; and shews their charters, that they had consufance of all fuits, contracts, covenants, quarrels (except concerning freehold); and this being a personal action, they ought to have consufance thereof.

DAMPORT, for the university, shewed an ancient record in this court in 22. Edw. 1. where a plea of covenant was brought in the court of the vice-chancellor of the university of Oxford, by reason of a contract made before that time, wherein was granted to them that they should have consufance of all actions personal and contracts; and the covenant in question was, that he should enjoy such an house in Oxford for a year; and because this court of the common pleas had granted a prohibition to stay the proceedings in the said suit, being begun in the court christian before the vice-chancellor, the record mentioned, that upon the shewing of this charter, it appearing the action was brought only upon the contract, and not *pro domibus*, therefore a consultation was granted: and it was prayed here, because this action was but personal, that they might have consufance thereof.

5. Co. 105. a.  
9. Co. 78. a.  
Lit. Rep. 252.

But ALL THE COURT denied it, and affirmed that the vice-chancellor had not any jurisdiction, nor might hold plea thereof; for in this action he shall recover possession, and shall have an *habere facias possessionem*, and thereby he that hath a freehold may be put out of possession: and it is not like to the record shewn, for there it is only an action of covenant, wherein the plaintiff shall recover damages only, and therefore reason to grant a *procedendo* there; but here he shall recover possession, and therefore by their own rules they ought not to hold consufance, nor have liberty to proceed in this case.

NOTE, That by this ancient record, it appears what are the privileges of the said university, and the jurisdiction of this Court to grant a prohibition where they proceed in the court christian, in prejudice of the commonlaw, without resorting to the chancery.

## CASE 13.

## Whytmore against Porter.

If a person act  
as an executor *de  
son tort*, by con-  
sent of the per-  
son who after-  
wards becomes  
administrator,  
and he admini-  
sters all the  
goods which the  
intestate died  
possessed of, an  
action will not  
lie against the  
executor *de son  
tort*.

Cro. Eliz. 102.  
406. 505. 565.

5. Co. 30. a. 34. a. Hob. 49. contra. 1. Mod. 214. 6. Mod. 213. 1. Sid. 76. Vent. 349. 1.  
Comm. Dig. 266. Cowp. 284. 2. Term Rep. 97. 587. 3. Term Rep. 587.

SIR WILLIAM WHITMORE and others, executors of Lady Craven, against Elizabeth Porter, executrix. In the exchequer, upon a special verdict, the case was this:

The defendant, as EXECUTRIX *de son tort demesne*, takes divers goods into her hands, to the value of four hundred pounds, and sells them by the assent and direction of John Porter her son, who afterwards takes letters of administration, and paid the just debts upon specialties, as far as the goods of the intestate amounted to, as well to the value of the said four hundred pounds sold by his mother, as of all the goods whereof the intestate died possessed; and after that an action of debt was brought against the feme as EXECUTRIX *de son tort demesne*, who pleaded *plene administravit*: and upon evidence all this matter was disclosed. The question was, Whether she shall be chargeable or not?

And

And it was adjudged by ALL THE BARONS, who delivered their opinions *seriatim*, that she shall not be charged, but that the plaintiff shall be barred; for this action being brought after the administration committed, and when she was chargeable for those goods to the administrator, and when the administrator had fully satisfied in paying the debts of the intestate, as far as all the goods of the intestate amounted to, it is not reason she should be charged against the plaintiff, for then she should be doubly charged, *viz.* to the administrator, and also to the creditors: also it is not reason that more should be satisfied out of the goods of the intestate to the creditors than the goods of the intestate amounted to; and so much being satisfied by the administrator, they should not have more; but if the action had been brought against her before the administrator had fully administered all in debts, peradventure it might have been otherwise; for she having gained goods into her hands, is chargeable for them, as *EXECUTRIX de son tort demesne*, until she gave satisfaction for them to the true administrator, or she herself satisfy for the true debt to the value. — Whereupon it was adjudged for the defendant,

WHYTMORE  
against  
PORTER.

Hobart, 49.

### Kinaaston against Moor.

CASE 14.

Hilary Term, 2. Car. 1. Roll 850.

**E**RROR in the exchequer chamber of a judgment in the king's bench in action of TROVER AND CONVERSION of divers goods, and among other things of 190l. *in pecuniis numeratis*. Upon not guilty pleaded a verdict was found for the plaintiff, and entire damages given. The error was assigned, Because *trover* and *conversion* cannot be of money out of a bag;

Trover for money out of a bag is good after verdict; but damages for the conversion only, and not for the taking, can be given.

But ALL THE JUSTICES AND BARONS agreed, that it well lies: for although it was alledged that money lost cannot be known; and so whether it was the plaintiff's money, whereof the *trover* and *conversion* was, as is the charge of this action, yet the Court said, it being found by a jury that he converted the plaintiff's money (for the losing is but a surmise and not material, for the defendant may take it in the presence of the plaintiff, or any other who may give sufficient evidence; and although he take it as a trespass, yet the other may charge him in an action upon the case in *trover*, if he will), the plaintiff had good cause of action. Wherefore the judgment before well given was now affirmed.

Ante, 18.  
Post. 262. 544.  
1. Roll. Abr. 5.  
Cro. Eliz. 819.  
824.  
Cro. Jac. 50. 262.  
Co. Lit. 207. b.  
Allen, 91.  
Danv. 20.  
Savil, 20.  
Clayt. 113.  
1. Mod. 31.  
Stra. 128.  
1. Com. Dig.  
219.  
5. Bac. Ab. 264. 1. Term Rep. 658.

THE JUSTICES AND BARONS said, that this action lies as well for money out of a bag, as of corn which cannot be known.

### Young against Pridd.

CASE 15.

Hilary Term, 2. Car. 1. Roll 778.—In the Exchequer Chamber.

**T**RESPASS (by the husband alone); for that the defendant, the fourth day of October, 22. Jac. 1. assaulted, beat, and ill-treated the wife of the plaintiff, and carried her away with such his goods, and detained for half a year, *per quod solamen et consortium* wife, will not bar an action by husband and wife, or by the wife alone after the husband's death, to recover damages for the battery. Yelv 87. Godb. 369.

A judgment recovered by a husband alone, for the forcible abduction of the

*sortium*



YOUNG  
against  
FRIDR.

*fortium quæ habere potuisset* with his said wife he lost, *et alia enormia* (a) *ei intulit ad damnum, &c.* Upon not guilty pleaded, the verdict was found for the plaintiff, and judgment given accordingly; on which a writ of error was brought in the exchequer chamber.

The error assigned was, That the husband hath brought this action for the *battery* of his wife, which he cannot do without his wife, and hath recovered damages for this *battery*; and therefore the judgment erroneous.

BUT ALL THE JUSTICES AND BARONS held, that the husband in this action did not recover damages for the *battery* of his wife, but for the loss which he had in wanting her company, and the *per quod consortium* and abduction of her is one entire conjoined act, and for that cause the damages were given. For the *battery*, true it is, that the wife ought to have joined to recover damages; and this verdict and judgment do not bar the wife to have an action after the death of her husband for the *battery*, or she may join with her husband in another action: and a precedent was shewn of 17. Jac. 1. *Hyde v. Scisfor* (b), where such an action was brought *verbatim*, as this action is in the king's bench, and recovered; and afterwards a writ of error was brought, and the judgment affirmed: and so all the Justices and Barons here held; whereupon this judgment was also affirmed.

(a) 1. Keb. 787. 1. Sid. 225. Cro. (b) Cro. Jac. 538. Easter Term, 17. Jac. 502. 664. 1. Mod. 127. Salk. 119. Jac. 1. Roll 157. & 167. 642. 1. Com. Dig. 572. 2 Term Rep. 4. 166.

Ante, 36.  
Post. 175.  
Cro. Jac. 77.  
502.

Strange, 61.  
977.  
B. R. H. 54.  
1. Wils. 256.

## CASE 16.

## More against Hodges.

## In the Exchequer Chamber.

If the *venire facias* be well awarded on the roll, the writ being mis-dated shall not impede the judgment.

Ante, 38. 54.  
Post. 273. 282.  
327. 595.  
Poph. 260.  
Noy, 83.  
Litch. 15.  
Cro. Jac. 64.  
Moor, 402.  
Doug. 114.

**E**RROR of a judgment in the king's bench in *assumpsit* for the payment of a thousand pounds for a marriage portion; and verdict for the plaintiff upon *non assumpsit* pleaded, and judgment accordingly.

The error assigned was, That the issue was joined in *Trinity Term*, 2. Car. 1. and the *venire facias* bears date 4th May, 2. Car. 1. which was before the issue joined; so the trial thereupon was ill: and by a writ of *certiorari*, upon *diminution* alledged, to certify the writ of *venire facias* and *distringas* whereupon the trial was had, they being certified the writ was of the date of *quarto Maii*, which was in *Easter Term*.

*Sed non allocatur*: for the trial upon the *distringas*, and the roll of awarding the *venire facias* being good enough, the mis-dating of the *venire facias* (which is a judicial process) is no cause to stop the judgment; for it is but a mis-suing of the process at the most, and aided by the statute of *jeofails*: and the Court intends, that there was another *venire facias* according to the roll, and subsequent to the issue, and so mentions the roll, and the *distringas* upon which writ the trial is by *nisi prius* made long after the issue; and therefore the trial is good, and shall be intended, that there was another *venire facias* warranted by the roll, and now wanting; and that this *venire facias* now certified is not the *venire facias* whereupon the trial was had. Wherefore, notwithstanding the error assigned, it was held by all the Justices and Barons, that the trial was good, and aided by the statute of *jeofails*.

THE SECOND ERROR assigned was, Because upon the *venire facias* is returned "*summonitus est*," where it ought to have been "*attachiatus est*."—*Sed non allocatur*; because it was but matter of form, which shall not be prejudicial after verdict. Whereupon the judgment was affirmed.

*Summonitus* instead of *attachiatus* upon the *venire* is matter of form.

4. Mod. 246. Fort. 341. 1. Saund. 318. 1. Bac. Abr. 92. Tidd's Practice, 222. Cro. Jac. 89. 108.

## Howell John against Thomas.

CASE 17.

Trinity Term, 1. Car. 1. Roll 158.—In the Exchequer Chamber.

**E**RROR in the exchequer chamber of a judgment in the king's bench in an ejectment.

The error was assigned, Because the plaintiff in the bill declares upon a lease for *three years*, but in the plea-roll, whereupon the issue is joined, and in the record of *nisi prius*, it is upon a lease for *five years*; so the bill and declaration varies. Diminution was alledged by the plaintiff, and by *certiorari* the bill was certified, that it was only for three years: and hereupon error being assigned, the defendant in the writ of error, when the plaintiff alledged diminution of the roll, had hereupon another writ of *certiorari*, whereby the bill was certified, wherein he declared upon a lease for five years; so it well warrants the declaration upon the roll and the *nisi prius*.

The question was, Which of these certificates should be allowed?

And it was held by ALL THE JUSTICES AND BARONS, that the second certificate, upon the diminution alledged by the defendant in the writ of error, should be received; for the bill certified upon it is intended the true bill, for it warrants well the declaration upon the roll and the record of *nisi prius*; and the other shall be intended a fictitious bill, and not the true one; and the allegation of diminution by the plaintiff in the writ of error, and procuring a certificate, shall not stop the defendant, without assigning of errors to alledge a diminution, and from procuring the true bill to be certified: so it is where the plaintiff in a writ of error alledgeth diminution, and procures an original to be certified, which doth not warrant the judgment. If in truth there be another writ-original, which well warrants the declaration, the defendant in the writ of error, for affirmance of the judgment, may well alledge diminution, and have a *certiorari* to procure the true original writ to be certified. Whereupon the judgment was here affirmed.

If error be assigned in the original, and upon *certiorari* an erroneous original be returned, and the Court, after *in nullo est erratum* pleaded, grant a second *certiorari*, upon which a good original is returned consistent with the record, the second certificate shall be received. Ante, 90.

Post. 271. 282. 327.

Moor, 701.

Cro. Jac. 131.

597.

Styles, 352.

1. Com. Dig.

319.

5. Com. Dig.

297.

2. Bac. Ab. 206.

2. Crompt. Prac.

360.

Cowp. 843.

Dougl. 114.

## Wolfe against Hole.

CASE 18.

**W**OLFE, attorney of the common pleas, brings an attachment of privilege against *Hole*, and declares in an action of the case upon an *assumpsit*. After verdict for the plaintiff, and judgment, error was brought and assigned, Because there were no pledges entered upon the imparlance-roll.

The omission of pledges on the imparlance roll in an attachment of privilege, cannot be amended

by the *nisi prius* roll. Ante, 46.—Hutton, 92. Hetley, 59. Dyer, 238. 3. Lev. 39.

HENDEN

WOLFE  
against  
HOLE.

Moor, 403.  
Cro. Eliz. 367.  
Cro. Jac. 414.  
Hob. 76.  
3. Bull. 278.  
1. Sid. 84.  
Ray. 51.  
Dyer, 288.  
3. Lev. 39. 361.  
3. Wilf. 142.

HENDEN now moved, that this might be amended, and pledges inserted; for in the *nisi prius* roll there the pledges are mentioned, which is sufficient to induce the Court; and he said it was but matter of form, and aided by the 18. *Eliz. c. 13.* after verdict.

But THE COURT denied the amendment; for although the issue-roll shall be amended by the imparlance-roll, because it is precedent, yet the imparlance-roll shall not be amended by the issue-roll, being subsequent: also the record being removed they would not amend it; for they said it was not form but substance. 18. *Edw. 4. 9.*

By 16. & 17. Car. 2. c. 8. after verdict no judgment shall be stayed or reversed for this omission; nor by 4. & 5. Ann. c. 16. any exception taken except on special demurrer.

## CASE 19.

## Phelps against Lane.

"Thy father,"  
innuendo the  
plaintiff, "is a  
thief," is not  
sufficient, with-  
out an averment  
that the speak-  
ing was to the  
son.  
Cro. Eliz. 444.  
Cro. Jac. 231.

**ACTION:** For that the defendant said of the plaintiff in presence of divers of the king's subjects, "Thy father is a thief," innuendo THE PLAINTIFF. After verdict, upon *not guilty*, it was moved, that this declaration was not good, because it was not alleged to be spoken to the son of the plaintiff, nor in their presence; and the word "innuendo" helpeth not.—ALL THE JUSTICES were of this opinion. Wherefore it was adjudged for the defendant.

1. Brawn. 7. 3. Lev. 68. 166. Salk. 513. Cowp. 276.

## CASE 20.

## Hilton against Robert Pawle.

Hilary Term, 2. Car. 1. Roll 630.

A parish in reputation which, in the forty-third year of queen Elizabeth had, and ever since has had parochial rates and churchwardens, shall be assessed towards the relief of its own poor.  
Post. 394.

S. C. Jones, 356.  
S. G. Hutt. 93.  
Hobart, 67.  
1. Sid. 292.  
4. Mod. 157.  
Ray. 477.  
Cowp. 407. 425.  
841.  
Dourl. 135.  
1. Term Rep.  
782.

**TRESPASS**, for the taking a saddle of the plaintiff's at *Stoke-goldingham*. Upon *not guilty* a special verdict was found, viz. that the parish of *Hinkley*, in the county of *Leicester*, is, and time whereof, &c. was, an ancient rectory and parish-church; and that the village of *Stoke-goldingham* is an ancient village, and parcel of the rectory of *Hinkley* aforesaid: and that from the time of king *Henry the sixth*, and always afterward until this present, there is and hath been a church in the said village of *Stoke-goldingham*, which, during all the said time, hath been used and reputed as a parish, and that the inhabitants of *Stoke-goldingham* aforesaid, during all the said time, have had all parochial rites and church-wardens; and that the said village of *Stoke-goldingham* is distant from *Hinkley* about two miles: and if *super totam materiam in formâ prædictâ compertam videbitur justitiariis et curiæ hic*, that the aforesaid village *Stoke-goldingham* be such a parish as by the statute of 43. *Eliz. c. 2.* for relief of the poor, is chargeable to the maintaining their own poor, then they say the defendant is guilty, to the damage of seven pounds and costs forty shillings: and if *super totam materiam in formâ prædictâ compertam videbitur justitiariis hic*, that the aforesaid village of *Stoke-goldingham* stands chargeable by the statute aforesaid to maintain the poor of *Hinkley* aforesaid, then they say that the defendant is not guilty.

And upon this verdict being argued at the bar by *ATHOE*, for the plaintiff, and *BERKLEY*, for the defendant;

THE



THE COURT resolved and delivered their opinions *seriatim* for the plaintiff, that this is such a parish within the 43. Eliz. c. 2. as is chargeable for the relief of the poor of *Stoke-goldingham*, and not for the poor of *Hinkley*: for being found that it was a church in the time of king *Henry the sixth*, *et tunc et semper postea* reputed a parish, and not in the negative, that it was not a parish before, it may be well intended to be a parish before, and it doth not exclude, that it was not before time whereof, &c. And although it should not be so intended, yet being found that it was a church *then*, and that there were churchwardens there, it is A PARISH within the statute, although it be but a reputative parish, for being in use so long before the statute, and at the time of the statute, the statute appoints that "the churchwardens, and three or four overseers of the poor joined with them, shall, &c.;" and no churchwardens of *Hinkley* are churchwardens of *Stoke-goldingham*, and by consequence have nothing to do there; and the churchwardens of *Stoke-goldingham* are only to meddle with the church there, and by consequence with the poor of the parish: and the statute hath an intention to confine the relief to parishes then in *esse*, and that every parish should meddle with his proper village, and their poor are to be provided for there, and not elsewhere. Wherefore it was adjudged for the plaintiff, *Vide Nicholl's Case*, fol. 394.

HUTTON  
against  
ROBERT  
PAWLE.

2. Bl. Rep. 1246.  
See Mr. Conft's  
edition of Bott's  
Poor Laws,  
vol. i. page 66.

## Oxford against Rivett.

CASE 21.

*Vide Ante*, 79.

THIS case was now moved again, and RICHARDSON, Chief Justice, HUTTON, and HARVEY, held their former opinion, that the issue was well enough joined, for there is no mention of any who *devastavit* in the replication; and necessarily it is intended, that the mother of the executor *devastavit*, for no other might make a *devastation*: and the rejoinder being, *quod prædicta KATHERINA non devastavit, et de hoc ponit se super patriam, et querens similiter*, and being found for the defendant, *quod non devastavit*, the plaintiff shall not avoid that verdict by saying, that it is not shewn who *devastavit*, so to take exceptions at his own replication.

HUTTON, Justice, said, admitting that no issue be joined, and that the verdict might not aid it, yet the judgment shall be against the plaintiff, for his replication is ill for another cause; for in the bar the defendant alledgeth, that she had administration committed to her *durante minore ætate* of Rivett, the son of the intestate, and that he came of age in 9. Jac. 1. and that afterwards he refused to be executor, and the administration was committed to Sir Hugh Wirrell, 3. December, 19. Jac. 1. The plaintiff replies, that before the commission of the administration to the said Sir Hugh Wirrell, viz. 6. October, 19. Jac. 1. *devastavit*; which admitting it should be intended that KATHERINA *devastavit*, yet that was a devastation after Rivett the executor came of age (who came of age in 9. Jac. 1.), and then she might not be chargeable therewith; so the allegation that *devastavit* 19. Jac. 1. is ill; and therefore judgment ought to be given against the plaintiff.

But for the other point, YELVERTON and MYSELF held our former opinion, that here is no issue; for intendment will not aid an issue totally mis-joined, Ante, 80. 1. Com. Dig. 332. 1. Term Rep. 51. a re-

A plaintiff shall not avoid a verdict by an exception to his own replication. Ante, 79, 80. S. C. Heel. 60. 1. Term Rep. 40. 2. Ter. Rep. 758. 3. Ter. Rep. 374.

To a *scire facias* against an administratrix *durante minore ætate* if the defendant plead that the executor came of age on such a day, and that she had then fully administered, a replication alledging a *devastavit* after that day is bad.

The statutes of jeofail will not aid a verdict on

OXFORD  
against  
RIVETT.

a replication; and being no issue, the verdict is void, and not aided by any of the statutes of *jeofail*.

But by the opinion of the other three Justices judgment was given for the defendant.

## CASE 22.

## Westley against Allen.

A prohibition shall go to restrain probate of a will after *non devisavit* found at law, or if part of the will relate to land.  
Post. 115. 166. 326.

Moor, 873.  
Cowp. 330. 424.  
2. Term Rep. 473.

A PROHIBITION was prayed for *Westley* against *Allen* to stay a suit in the spiritual court, concerning the probate of a will which was of goods and land; which will was alledged to be revoked (and so it proved) upon a suit at the common law for the land. Upon issue of "*non devisavit*," it was proved to be absolutely revoked *in toto*, and a "*non devisavit*" found; and now the suit is in the spiritual court to prove it to be a good will and not revoked. Upon this suggestion THE COURT gave day, if cause were not shewn to the contrary, that a prohibition should be granted: for the Court held, that if the question had been in the spiritual court for probate of a will of goods and land, and making an executor, that they should not proceed to prove the will *quoad* the land, but that a special prohibition as to the land should be granted.

## CASE 23.

## Morant against Cumming.

Qu. If the king's patentee of forest lands belonging to the Crown can prescribe in *non decimando*?

Hetley, 60.  
Moor, 915.  
1. Lev. 185.  
2. Co. 44. a.  
Cro. Eliz. 785.  
Styles, 137.  
3. Burr. 1273.

MORANT, lessee of the earl of *Hertford*, against *Cumming*, vicar of *Lirbeck*, prays a prohibition to stay a suit in the spiritual court for tithes, because the lands were parcel of the forest of *Beare*, whereof KING JAMES was seised in fee *in jure coronæ*, and he and all his predecessors held it discharged of payment of tithes, and granted it to the said earl of *Hertford* in fee, and so he ought to hold them discharged. And it was doubted whether the patentee may have such privilege, or that it be only a privilege annexed to the crown during the time that the land was in the crown. But it was granted *de bene esse*, unless cause were shewn to the contrary such a day (a).

(a) *Vide* *Hartford v. Leach*, W. Jones, 387. where after divers arguments at the bar it was adjudged, that the king may prescribe in *non decimando*, because he is *persona mixta*; but that this is a personal privilege, and therefore his grantee shall not have the benefit of it. S. P. Hard. 315. 1. Roll. Abr. 655.

## CASE 24.

## Owen against Thomas ap Rees.

Hilary Term, 2. Car. 1. Roll 1789.

A lease for three lives, dated 30th August, *habendum* from the day of the date, and livery made 1st September, is good.  
Post. 388.  
Hetl. 22. 27.  
Cro. Jac. 563.  
3. Co. 94. b.

ACTION OF TROVER of twenty loads of wheat, &c. Upon not guilty pleaded, and a special verdict,

THE FIRST QUESTION was, Whether a lease for three lives by indenture, dated 30th August, 20. Eliz. HABENDUM *à die datæ*, and letter of attorney made 1st September, 20. Eliz. to make livery, and livery is made accordingly, be a good lease? because if livery had been made the same day it bears date, and the letter of attorney had been in the same deed, it had been merely void.

Cowp. 714.

THE SECOND QUESTION, Admitting that livery by letter of attorney subsequent be good, whether a lease being made by a bishop for three lives, viz. to one for life, remainder to a second for life, remainder to a third for life, so not warranted by the 1. Eliz. c. 10, and the successor accept the rent: whether this be a good lease against the successor himself, who accepted the rent, and shall bind him during his time, so as he cannot enter to avoid it, and make a new lease?

6. Co. 37. a. Cro. Jac. 173. Hetley, 22. 3. Com. Dig. 254. 3. Bac. Abr. 350. 366. 394.

These were the points intended, and were argued at the bar, but for a fault in the lease whereby the defendant claimed, the matters in law were not resolved; but judgment was given for the plaintiff, without any of the justices opinions concerning these points. The fault was, that the bishops there usually by one lease had let three manors, reserving 32l. rent yearly, which was found to be the ancient rent; and the bishop here makes a lease "HABENDUM to Thomas ap Rees and his assigns, rendering to the bishop and his successors the usual and accustomed yearly rent, and the rents and services at the days and times usually accustomed," and he doth not shew any rent in certain.—And because the ancient rent of thirty-two pounds had been usually paid, where the three manors were let together, and not expressly reserved upon this lease, therefore ALL THE COURT held, that this lease, under which the defendant claims, is a void lease by the statute to bind the successor; and the successor having entered and made a good lease to the plaintiff, if this lease to the defendant be not *in esse*, it ought to be adjudged for the plaintiff.

But, in the argument of this case at the bar, for THE FIRST POINT was cited *Greenwood v. Tyler (a)*, where it was adjudged, and affirmed afterwards in the exchequer chamber upon a writ of error, that if one make a lease for life by indenture, dated 20th August, 2. Edw. 6. *habendum* from Michaelmas following for three lives, and livery be made by the lessor after Michaelmas, it is a good lease by the indenture (for it was a lease by husband and wife of the land of the wife which ought to enure by the deed, otherwise it had not been good to bind the wife, for it was adjudged it bound her). So it seemeth a letter of attorney, being two days after the deed, is as good as if it had been made in person.

For THE SECOND POINT, another case was cited to be adjudged, *Wheeler v. Danby (b)*, upon a special verdict in an ejectment for an acre of land in *Maysemore*, in the county of Gloucester: That whereas Richard bishop of Gloucester was seised in fee of the manor of *Maysemore*, whereof this acre is parcel, and by indenture 8. Eliz. demised that acre to Jasper Danby and William Danby, *HABENDUM* to the said Jasper à die datus indenturæ for his life, remainder to the said William Danby for his life, rendering 3s. 2d. by the year, at Michaelmas and the Annunciation; and that the said Richard bishop of Gloucester grant a lease for life, *HABENDUM à die datus indenturæ*, with remainder over, it shall be intended that livery was made after the day, and so good; and if the successor accept rent from the lessee, it is good against him also. 1. Roll. Abr. 476. Moor, 318. Pöwel on Powers, 488. Hal. MSS. Co. Lit. 45. 3. Bac. Abr. 391. 394. and the cases there cited. 3. Com. Dig. 342. Cowp. 714.

(a) Hob. 314. Cro. Jac. 563. Palm. 29. (b) Easter Term, 5. Jac. 1. Roll 1640. In C. B.

Gloucester



OWEN  
against  
THOMAS AP  
REES.

Co. Lit. 45. a.  
3. Co. 59. b.  
1. And. 244.  
Moor, 875.  
1. Leon. 308.  
10. Co. 62.  
1. Roll. Ab. 476.  
Cro Jac. 173.  
Carth. 16.  
2. Com. Dig.  
462.

Gloucester died, and Godfrey late bishop of Gloucester was created bishop; and having notice that divers rents of the said manor were due and unpaid, commanded J. W. his bailiff of the said manor, to receive the said rents arrear, who accordingly received them, whereof the rent of the said William Danby was amongst others paid to the said Godfrey, not giving notice particularly to the said bishop that the said rent received of the said William Danby was the rent of the said William; and that the said bishop generally 43. Eliz. accepted of all the said rents by the hand of his bailiff; and found the statute of 1. Eliz. c. 19.; and that the said Godfrey bishop of Gloucester, 1st April, 44. Eliz. demised to the said plaintiff the said acre and all tithes growing thereupon for one-and-twenty years, and that the plaintiff entered and was possessed until the defendant William Danby ejected him; and upon this verdict judgment was for the defendant. And it was alledged at the bar that it was resolved hereupon, that although the lease be for life *habendum à die datus*, yet being found *quod episcopus dimisit*, it shall be intended, that livery was made *after the day*, and then it was a good lease.—SECONDLY, This acceptance of the rent by the bishop's successor shall bind him for his time, so as he shall not avoid that lease which was otherwise voidable, because it is a lease of parcel of the demesnes, and for two lives, the one after the other in remainder. And the copy of this record was brought me, whereby I saw judgment was given upon this verdict for the defendant. *But quære*, Whether it was for this cause alledged, or that the plaintiff's lease was not warranted by the statute of the first of Elizabeth?

## CASE 25.

## Anonymous.

No one can  
vouch the king,  
because it is in  
the nature of an  
action; and if  
a fine be levied  
by the king, it  
shall be by *render*,  
and not by  
*covenant*.

3. Hen. 7. pl. 14.  
Theolal. 64. c. 2.  
f. 2.  
7. Co. 32.  
3. Com. Dig.  
232.

NOTE. A common recovery in a writ of entry against J. S. for the manor of D. in the county of Buckingham, was endeavoured to be drawn, and suffered at the bar; wherein the tenant prayed *aid of the king*, by reason of a warranty in the king whereby he warranted that land, and granted to make recompence upon eviction; and this *aid prayer* was to be instead of a *voucher*. The warranty being created by fine and recovery drawn in paper, wherein the tenant vouched THE KING, and SIR ROBERT HEATH, the king's attorney (by a warrant as he said from the king), entered into the warranty, and prayed, that the demandant might count; and so it was drawn, that the demandant *petit versus dominum regem*, that land (as the usual manner of the courts in common recovery is) and that the attorney of the king voucheth over the common vouchee. But this being perused by the Court, although the attorney said he had warrant for so doing, yet because such a course hath not been seen, nor any precedent shewn, that ever any should count against the king as vouchee; and this course is now devised to bar a remainder expectant upon an estate-tail in the king (as a fine by the king is sufficient to bar an estate-tail in him); and although it is used to be levied by the king, yet that is done by way of *render*, and not by an immediate writ of *covenant*; therefore THE COURT would not suffer this recovery to pass; for the king shall

shall never render in value upon voucher; but in such case they ought to sue to the king by petition to have in value, and not by way of voucher. *Vide* 9. Hen. 6. pl. 3. & pl. 56. 25. Edw. 3. pl. 39. Pl. Com. 553. 39. Edw. 3. pl. 11.

Smith *against* the Executors of Poyndreill.

CASE 26.

**P**ROHIBITION was granted upon the 23. Hen. 8. c. 9. for suing for a legacy of ten pounds in the prerogative court, whereas the parties dwell in another diocese. But because the will was proved in the spiritual court, and the suit in the same court where the probate was, and there sentence given for the legacy; and afterwards an appeal upon this sentence to the delegates, where it was affirmed, and costs taxed, and excommunication upon the sentence; and in all this time, until after the sentence in the appeal, not any endeavour made to stay these suits by the said statute; therefore having so long allowed the jurisdiction of the said courts, he came now too late to have a prohibition.

A prohibition refused because the party applying had submitted to the jurisdiction of the spiritual court. Post. 162. 339. Cro. Jac. 321. 429. 483. 5. Mod. 450. Carth. 423. 469. 4. Com. Dig. 496.

Salk. 164. Cowp. 330. 422. Dougl. 378. 1. Term Rep. 552. 2. Term Rep. 475.

And although a prohibition was before granted, because the party had not notice to contradict it, yet THE COURT would not compel the party to appear and plead thereto (as is the usual course in such cases); but upon motion granted A CONSULTATION.

If prohibition be granted without notice, the Court will grant a consultation.

Yelv. 79. 12. Co. 44. Cro. Jac. 429.

Sir Randolph Crew *against* George Vernon.

CASE 27.

**U**PON a petition exhibited by Roger Downs, vice-chamberlain of Chester, to the king, he referred the consideration thereof to THE LORD KEEPER, calling to him any of the justices of the benches; who thereupon called JUSTICE JONES, BARON DENHAM, JUSTICE YELVERTON, and MYSELF.

The sole question was, Whether a commission issuing out of the court of Chester, betwixt Sir Randolph Crew, late Chief Justice, and George Vernon, esquire, now one of the barons of the exchequer, to examine witnesses in a case depending before the chamberlain of Chester, which was awarded in Hilary Term, 22. Jac. 1. returnable in Easter Term following, was well executed?

The commissioners began the examination of their witnesses upon the 28th March 1625, being Monday, which was the day after the demise of KING JAMES, and continued in examination of divers witnesses on both sides until the Friday following; at which day, and not before, having notice of the demise of the king, they surceased, and returned all what they had done.

Upon a motion to the said court of Chester for the suppressing of those depositions, as examined without warrant, and before those who had not any authority, it was agreed by all that, by the demise of the king, the commission was legally determined without any notice; yet the said Roger Downs, upon view of precedents out of

A commission issuing out of a court of equity for the examination of witnesses, was (before 7. & 8. Will. 3. c. 27. s. 21 and 1. Ann. c. 8. s. 5.) determined *ipso facto* by the demise of the king; but the depositions taken under it without notice of such demise, shall stand good and be published.

Moor, 333. 1. Hale P. C. 499. 2. Hale P. C. 24.

THE

SIR RANDOLPH  
CREW  
against  
VERNON.

THE COURT OF WARDS, where such depositions taken in that court remain, within two days after the demise of the king, and exception taken for stay of publication, RESOLVED, "That they should stand and be published;" and, upon a certificate from the six clerks in the chancery, that they conceived it might well be done, ORDERED, "That for the more legality of the proceeding, a new commission should issue to the ancient and former commissioners that they should examine as many of the witnesses as were alive, reading to them the former depositions and the interrogatories; and if they affirmed them, then they should stand, if otherwise, they should be suppressed; and such depositions of those who were dead (if any) should stand, and that they should examine any new witnesses upon the same interrogatories, but not upon others."

Whereupon the said *George Vernon* by petition complained to the king, and accused the said *Roger Downs* of partiality; and that the justices of assize joined with the said *Roger Downs* in making orders in this cause, and thereupon obtained another order under the king's hand to stay the former proceedings.

Afterwards the said *Downs* exhibited a petition to the king, suggesting that the former petition was scandalous to the Court, to the Justices, and to himself; whereupon this matter was referred to the examination of THE LORD KEEPER and THE JUSTICES.

And upon the examination of both petitions, and hearing counsel on both parts, THE LORD KEEPER and ALL THE SAID JUSTICES resolved, and so certified the king, that they conceived this order was just, and great reason that the depositions should stand: for although legally the commission was determined by the demise of the king (a), yet the commissioners not having notice thereof, and having examined concerning the same, they held, that such witnesses were duly sworn, and should be allowed, especially in a court of equity, where the proceedings be *jure naturali*, and not according to the strict course of law.

And they further certified, that no inconvenience could ensue upon such proceedings before notice of the king's demise; but if otherwise, it would draw in question many trials by verdicts of *nisi prius*, and trials and attainders upon gaol-deliveries, whereupon divers have been arraigned and executed since the king's demise, and before notice thereof; *à multo fortiori* they held, that the examination of witnesses should stand.

And they further certified, that they approved of the said course, that the witnesses should be called, and their former examinations and interrogatories tendered to such of them as were alive, and to enquire whether they approved of them, and not to examine them *de novo*; and of the direction to examine the new witnesses upon the same interrogatories, and not upon others, for then inconvenience might ensue.

(a) See now 7. & 8 Will. 3. c. 27. f. 21. and 1. Ann. c. 8. f. 5.



And lastly they humbly desired, that to rectify the credit of *Mr. Downs* and the proceedings of the Court, his majesty would be pleased to revoke his order of restraint, and that this certificate, now to be made, might be sent into the county of *Derby* to be read there, and that the proceedings might be according to the former order; yet forasmuch as the cause was weighty, that upon the final hearing and determination thereof, the Court might be assisted by the justices of assize of the said county, which is without prejudice to the reputation of any of them: and so it was certified accordingly.

Sir RANDOLPH  
CREW  
against  
VENNON.

Upon this conference the lord-keeper propounded this question unto us: If any witnesses examined upon such an illegal commission should be perjured, Whether they might be punished by the 5. *Eliz.* c. 9. for that perjury? And we all conceived they might; for being examined before notice of the king's demise, what they did was legal, as the Books are in 34. *Affis.* pl. 8. 5. *Edw.* 4. pl. 12. 22. *Hen.* 6. pl. 29.

Perjury may be assigned on an answer under a commission for the examination of witnesses, although after the commission had determined

by the demise of the king.—4.

Com. Dig. 147.

### Stephens against Potter.

CASE 28.

A CASE depending before the lord-keeper, and agreed upon by counsel on both sides, and set down under their hands, was, That *Mr. Tate*, seised in fee of the advowson of *Wotton*, by his deed let that advowson and divers other lands for years to *Lord Zouch* and others for the payment of his debts, and died seised of the inheritance. Some of his lands being holden by knight-service in capite, and his son and heir *Zouch Tate* within age, which was found by office, the king granted the wardship of body and lands to the said lessees, rendering rent to the receiver or his deputy within forty days after the Feasts appointed for payment, with a clause to be void for non-payment. The rent due at *Michaelmas*, 20. *Jac.* 1. was arrear, and in *February*, 20. *Jac.* 1. the rent was paid to the receiver, and all rents after duly paid. The church becomes void during the minority of the ward, and afterward the king presents to the church under THE GREAT SEAL, and under the seal of THE COURT OF WARDS, *ut supponitur* (a), *viz.* *Potter* under the seal of the court of wards, as to a church which appertained to the king *ratione minoris etatis* of the said ward, who first obtained institution and induction; and afterward *Stephens* under the great seal, who likewise obtained institution and induction.

A presentation by the king of a church in right of a ward may be either under THE GREAT SEAL or the seal of the court of wards; but if it be not in right of a ward, it must be under THE GREAT SEAL.  
Post. 592.  
Moor, 476.  
Cro. Jac. 248.  
3. Com. Dig. 199.

And, Which of these were parson? was the question.

And, FIRST, it was agreed, that the king may present to any church which he hath in right of wardship, either under the great seal or under the seal of the court of wards; but a presentation under the seal of the court of wards, if he hath not right to present in right of the ward, is void, and cannot make an usurpation, because the title to the presentation is void, and so no presentation; and an institution without presentation is void, as it is held in *Green's Case*, 6. *Co.* 29. b. and 8. *Jac.* 1. in the common pleas,

(a) Instituted by 32. *Hen.* 8. c. 46. and tenure to which wardship was an appendage.  
abolished by 12. *Car.* 2. c. 24. with the

where

STEPHENS  
against  
POTTER.

A lease from the crown is not void, but voidable only, for non-payment of the rent according to the reservation.

Post. 173.

5. Co. 36.

Cro. Eliz. 221.

Moor, 295.

Plowd. 229.

Doughl. 50.

If the king's right to grant results from wardship and prerogative, *Qu.* Whether the grant shall be under the great seal or that of the court of wards?

*Qu.* Whether, if the king make a second presentation without mention or revocation of the former, it shall

where it was resolved accordingly, that a presentation may be under any seal.

SECONDLY, It was agreed, That the lease for years made of the land and advowson under the seal of the court of wards, is not absolutely void by the non-payment of the rent reserved upon the said lease for years without office, because the rent was payable to the receiver or his deputy, which is matter of fact *in pais*; for there is a difference betwixt a lease for years, reserving rent payable at the receipt of the exchequer, with such provisos *ut supra*, and when it is payable to the receiver or his deputy: for in the first case, the payment or non-payment appears by record, and therefore to prove the non-payment there needs no office; but in the last case, the payment is to be made to the receiver or his deputy, and that appears not of record, and therefore the lease not void by the non-payment without office. And so, it was said, was the resolution in the Case of *Sir Moyle Finch v. Throgmorton*.

THE THIRD OBJECTION was, Admitting the lease made of the wardship to be void for non-payment of the rent without office found, yet because the king hath but a third part of this advowson by the wardship upon the statute of 32. *Hen.* 8. c. 28. against leases made for payment of debts, and hath title to present to the other two parts by his prerogative, which ought to be under the great seal (for that shall have the pre-eminence to be preferred in grants), Under which of these seals it ought to have been made?

THE FOURTH OBJECTION was, That forasmuch as the presentation under the great seal, and the presentation under the seal of the court of wards, were both the same day, and the presentation under the seal of the court of wards doth not mention the first presentation and revoke it, Whether it shall be good?

be void?—2. Roll. Abr. 188. Dyer, 339. *in marg.* Cro. Jac. 248. Bendl. pl. 279.

Latch. 191. 253.

But to these two last points no opinion was delivered, because the lord-keeper conceived, for the last reason, that the presentation under the seal of the court of wards was void: and he established the possession with *Stephens*, the presentee of the king under THE GREAT SEAL.

# Hilary Term,

## 3. Car. 1. In the Common Pleas.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir Richard Hutton, *Knt.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.* }

Sir Edward Peto *against* Pemberton.

CASE I.

*Michaelmas Term, 3. Car. 1. Roll*

**R**EPLEVIN. The defendant made cognizance as bailiff to *Humphrey Peto*, because that *Humphrey Peto*, his father, had granted a rent-charge of 6l. 13s. 4d. to him for his life, and for forty-six pounds rent arrear at the *Annunciation primo Jacobi* he distrained, and averred the life of the grantee.

The plaintiff confesseth this grant; but that afterward this land so charged descended to the said *Edward Peto*, who let it to the said *Humphrey Peto* for five hundred years, 1 April, 10. Jac. 1. and that the said *Humphrey Peto* entered by virtue of the said lease for years, and was possessed; *et hoc, &c.*

The defendant rejoins, That after this lease, and before any part of the rent was arrear, viz. 16. December, 16. Jac. 1. he surrendered *dimissionem prædictam* of the said lands to the said *Edward Peto*, *qui ad tunc et ibidem* thereto agreed; *et hoc, &c.* And hereupon the plaintiff demurred.

FIRST, It was objected, That the pleading of the surrender *dimissionis prædictæ*, and not of the tenements, or of all his estate therein, was not good.—*Sed non allocatur*; for the surrender of the lease implies all his estate and interest, and so it is intended; and although the usual course is to plead surrender of the estate, yet it is all one, and so much is implied.

SECONDLY, It was objected, That although he hath pleaded a surrender, and that the lessor agreed thereto, yet because it is not pleaded that the lessor entered, the rent which was suspended remains yet suspended until the lessor enters or waives the possession.—*Sed non allocatur*; for when he pleaded that the lessor agreed to the surrender, it shall be intended that he entered; and it is not usual to plead a re-entry upon a surrender, no more than, when a feoffment is pleaded, to plead livery and seisin thereof, because it is to be admitted.

Post. 162. 1. Co. 52. b. 8. Co. 82. b. Co. Lit. 3. 2. Vent. 207.

THIRDLY, For the matter in law, when the grantee of a rent for life accepts of a lease for years of part of the same land, and surrenders the land from the reversioner, and the lease is afterwards surrendered, the rent revives.

CRO. CAR.

H

renders

A rent-charge for life is suspended by the acceptance of a lease for years of the land; and revives again by a surrender of the lease.

Hutley, 50 71. Hutton, 94.

4. Co. 52. Co. Lit. 313. a. Cowp. 482. Dougl. 50. 58. 1. Term Rep. 86.

In pleading the surrender of a lease, it is sufficient to say the demise aforesaid. Plowd. 194. 2. Vent. 207.

In pleading a surrender of a lease it need not be shewn that the lessor entered after the agreement to surrender; but the lessor's assent must be shewn.

If the grantee for life of a rent accept a lease of Ante, 83. Co.



SIR E. PETO  
against  
PEMBERTON.

(a) 21. Hen. 7.  
pl. 7.  
19. Hen. 6 pl. 4.  
and 45.  
7. Hen. 6. pl. 2.  
8. Co. 135. b.  
Co. Lit. 338.  
2. Lev. 80.

renders the said lease, Whether the rent remains suspended during the years, or be revived presently by the surrender? BRAMPSTON, *Serjeant*, much urged, that it is determined during the term for years; for if he had granted this lease over, it had passed the rent inclusively; so in this case where the lessee surrenders, it is *quasi* a grant to him of the term, and therefore the rent shall not be revived: but he agreed, if the lease had been to the grantee of the rent upon condition, and the lessor had entered for the condition broken, or had recovered in waste, the rent had been revived, for the lease is absolutely determined (a); but here the lessor is in by the lessee *quasi* by his own act, and therefore it shall not be revived.—But ALL THE COURT held, that the rent was revived; for by the surrender and agreement of the parties the lease is absolutely determined and not *in esse*, and none of them can say it is *in esse*; but a stranger who is to have benefit thereby may well say that it is *in esse* as to him; but *quoad* the lessor and lessee it is determined, and the possession and interest is in him without entry: wherefore it was adjudged for the avowant.

## CASE 2.

## Standford against Cooper.

Hilary Term, 2. Car. 1. Roll 2674.

The *essoign day* is, in law, the first day of the Term; and all legal acts shall relate to that day, and not the *quarto die post*.

Hutton, 72.  
Yelv. 35.  
1. Bullst. 32.  
Jenk. 250.  
Herley, 95.  
1. Bl. Rep. 227.  
496.  
Cruise on Fines, 54.  
Gillb. Uses, 79.  
2. Term Rep. 16.  
3. Term Rep. 185.

SCIRE FACIAS upon a judgment in debt, in Hilary Term, 22. Jac. 1. against one *Bill*. The defendant, being returned, *terre-tenant*, pleads a statute acknowledged by the said *Bill*, 22 January, 22. Jac. 1. and an extent by virtue of the said statute.

The question was, If this judgment shall relate to the first day of Hilary Term, which was the twentieth of January, being the *essoign day*, or only to the twenty-third of January, which was *quarto die post*? for if it related to the twentieth of January, being the *essoign day*, it is precedent to the statute.

And ALL THE COURT agreed, That the judgment shall have relation to the *essoign day*; for in law it is the first day of the Term, and all legal acts have relation thereunto, and the *quarto die post* is the day of grace, till when for divers purposes no party shall be prejudiced for not appearing; but as to common intendment, it hath relation to the *essoign day*: wherefore, being upon a demurrer, it was adjudged accordingly for the plaintiff. *Dyer*, 200. and 361. 34. Hen. 6. 20. 22. Hen. 6. 7.

## CASE 3.

## Biggot against Smyth.

In the Exchequer Chamber.

An estate limited to husband and wife for life, remainder to the survivor of them in fee, if the husband make a feoffment

UPON a special verdict in the exchequer was this case tried. A man seised of lands in fee conveys it by feoffment to the use of himself and wife, and to the heirs of the survivor of them. The husband afterwards makes a feoffment of this land, and dies; the wife enters, and dies.

The question was, Whether by the wife's entry the fee shall vest in her surviving, so as her heirs shall enjoy it?

The contingency is destroyed, and the wife's entry upon his death will not support the fee.—Co. Lit. 46. b. 378. 2. Roll Abr. 796. 1. Co. 134. b. R. 697. 738. 2. Lev. 39. Com. Rep. 45. 3. Mod. 309. 1. Vent. 18. Farnes's Essay on Contingent Remainder, 4th edit. 7. 434. 457

And

And IT WAS ADJUDGED, That this feoffment of the husband hath destroyed his future contingent use of the fee; for whatsoever cannot accrue at the time of the death of the party who first dieth, cannot afterwards by any act be revived, but is absolutely extinguished. And a writ of error being brought in the exchequer chamber before the lord keeper and the lord treasurer of England, being both of them lawyers, and before the two Chief Justices HYDE and RICHARDSON, and before WALTER, Chief Baron, this judgment was this Term affirmed, as the said chief baron related to me.

L. Ray. 314. says, this case is nice to an instant, for the right ought to be precedent to support the contingency; and therefore, because the right arose to the wife *eo in-*

*stante* that the contingency happened, the remainder was adjudged to be destroyed; and the case has always been held for law. See also Com. Rep. 46. Fearn, 4th edit. 457.

Sir Thomas Holt *against* Sambach.

CASE 4.

Trinity Term, 2. Car. 1. Roll 731.

**R**EPLEVIN. Upon demurrer the case was: *Sir William Catesby* by tenant for life of the manor of *Lopworth*; remainder to *Robert* his son and heir apparent, and to the heirs-males of his body; remainder to *Sir William Catesby*, and to the heirs-males of his body; life, though an remainder to the heirs of the body of the said *Robert*; remainder to the right heirs of the said *Sir William Catesby*. The said *Sir William Catesby* and *Robert*, being within age, join in a deed, whereby the said *Sir William Catesby* grants, and the said *Robert* confirms, to the said avowant and his heirs, an annual rent of ten pounds by the year, payable out of the said manor of *Lopworth*, to the said defendant and his heirs, at two Feasts, viz. at the *Annunciation* and *St. Michael*, with clause of distress, and *nomine pænæ* of twenty shillings for every month. *Sir William Catesby* and *Robert* join in a fine of the said manor to the use of the said *William* and his heirs, who infeoffeth the plaintiff, and dieth. *Robert* hath issue yet living.

A rent-charge, with a *nomine pænæ*, granted by tenant for life, though an infant, is good against the feoffee under a fine levied by the tenant for life and the infant in remainder, if the tenant for life hath the remainder *in fee*. But an avowry for parcel of the penalty without shewing the residue discharged, is bad.

The defendant avows for twenty shillings, parcel of five pounds due at *Michaelmas* in the second year of *James* the first; and because two hundred pounds were due *pro nomine pænæ* for two hundred months, he avows for fifty pounds of this *nomine pænæ*. The defendant sets forth all this matter by way of avowry, except the nonage and feoffment to the plaintiff.

Hettl. 74.  
Hutt. 96.  
Carth. 415.  
3. Mod. 301.  
3. Burr 1798.  
Co. Lit. 18.  
Harg. edit. note (4).  
1. Term Rep. 738.  
Cro. Jac. 428  
1. Co. 62.

The plaintiff, in bar of the avowry, shews the nonage of him who confirmed, and pleaded the feoffment, and averment of the life of the issue in tail.

Upon this bar to the avowry it was demurred, and argued at the bar.

The sole question was, Whether this debt be chargeable upon the feoffee? because it was granted by tenant for life, and confirmed by him in the remainder in tail, being within age at the time of the grant.

For it was agreed, if a rent be granted by tenant for life, and confirmed by him in remainder in tail within age, that it is issuing out of the estate for life only, and merely a void grant as to the remainder; and if the tenant for life purchase the remainder or reversion and die, it shall not bind the inheritance; and although he had made a feoffment over, his feoffee, after his death, should avoid it.

SIR T. HOLT  
against  
SAMBACH.

But here, because he that made the grant is not only tenant for life, but hath a remainder in tail, and after that a remainder in fee, the rent is issuing out of all his estates; and although it was void as against *Robert* the son, who was next in remainder in tail, who confirmed it, yet forasmuch as this estate tail is barred by the fine, and the limitation thereof to the use of him and his heirs who granted the rent, and the plaintiff being in as feoffee to him, the Court inclined in opinion for the avowant's right to the rent; for the estate tail being barred, that privilege shall not extend to the feoffee, for he comes in under all the estates of the feoffor, who granted the rent-charge, and therefore shall hold it charged.

An avowry for part of a rent or penalty is bad, unless it shew how the remainder was discharged.

Post. 137. 436  
20. *Edw.* 4. pl.  
Cro. Eliz. 22.

But because the avowry was for twenty shillings parcel of five pounds, and the fifty pounds was parcel of the two hundred pounds penalty, and he did not shew that the residue of the penalty was discharged, therefore IT WAS HELD, that the avowry was ill, according to 20. *Hen.* 4. c. 2. 48. *Edw.* 3. c. 3. and so, without regard to the matter in law, it was adjudged for the plaintiff, upon the insufficiency of the avowry.

48. *Edw.* 3. pl. 3. *Dyer*, 65. *Lutw.* 535. *Hutton*, 96. 2. *Lev.* 4. *Moor*, 298. *Yelv.* 5. 1. *Bulst.* 49. *Ld. Ray.* 155. 644. 2. *Elphin Dig.* 18. See 11. *Geo.* c. 9. s. 11.

#### CASE 5.

#### Sir Simon Bennet's Case.

The dignity of baronet is not within the provision of 1 *Edw.* 6. c. 7; for there was no such title at the time the act was made.

Post. 371.

*Hob.* 129.

*Cro. Jac.* 482.

1. *Sid.* 40.

*Lit. Rep.* 81.

2. *Hawk. P. C.* 22. 270.

DEBT upon an obligation. The defendant, in abatement of the writ, pleaded, that the plaintiff *puis darraign continuance* was made a baronet; and it was thereupon doubted whether the writ should abate, for that the statute of 1. *Edw.* 6. c. 7. recites the dignities of dukes, earls, viscounts, barons, justices of both benches, and serjeants at law, but mentions not baronets, whereby it seemeth it was not a dignity known at the making of that statute; but if it were a dignity then known and omitted out of the said statute, THE COURT then held it to be out of the statute. But it was then doubted by THE COURT, Whether, if it were a dignity then created after the statute, the said statute should in equity extend thereunto? And THE COURT directed, that the plaintiff should demur thereunto, and upon argument it should be resolved; but in regard it was only in abatement of the writ, and it would be but a *respondes ouster* though adjudged for the plaintiff, the plaintiff thereupon offered to bring a new original, and the defendant consented to appear *gratis* thereto, and plead in bar; and so these doubts were left undetermined.

#### CASE 6.

#### Lady Chichesley against Thompson and the Bishop of Ely.

*Easter Term*, 2. Car. 1. Roll 302.

Special pleadings in *quare impedit*.

*Hetley*, 17.

*Hutton*, 96.

QUARE IMPEDIT to present to the church of *Wimple*; and counts, That *Sir Thomas Chichesley* was seised in fee of the advowson of the church of *Wimple*, as of an advowson in gross, and presented *Marshall*, and died seised, which descended to *Sir Thomas Chichesley*, the husband of the plaintiff, who upon the 20 *March*, 8. *Jac.* 1. by indenture granted it to *Thomas East* and another in fee, to the use of the plaintiff for her jointure, and after to the use of himself in tail, and afterwards died seised. The church becomes void by the death of *Marshall*, wherefore it belonged to her to present.

The



The bishop dies pendent the writ. The defendant pleaded, That he is *parsona imparsonata* of the said church *ex presentatione regis*; and shews, that *Sir Thomas Chichesley*, the plaintiff's husband, died seised in fee of the advowson of *Wimple*, as of an advowson in gross, and of the manor of *Preston* in the county of *Cambridge*, holden of the king by knight-service *in capite*, and they descended to *Thomas Chichesley*, son and heir, being of the age of two years; and that an office was found before the escheator of that county by a writ of *diem clausit extremum*, whereby this tenure and descent were found, whereupon the king was seised, and presented the defendant; who was instituted and inducted; *ABSQUE HOC*, that the said *Thomas Chichesley* granted the said advowson to *Thomas East* and the other, *prout, &c.*

LADY CHICHESLEY  
against  
THOMSON, &c.

The plaintiff replies, *quod non habetur aliquod tale recordum de inquisitione*; and it was thereupon demurred.

THE FIRST EXCEPTION was taken to the bar, because he saith that he is *parsona imparsonata*, and doth not say *tempore impetrationis brevis*.—*Sed non allocatur*; for it is inferred by the writ brought against him: and if he be *parson imparsonate* before the plea pleaded, it sufficeth; and divers precedents were cited in the New Books of Entries, fol. 494. 405. 407. to that purpose.

In quare impedit the plea of *parsona imparsonata* need not add *tempore impetrationis brevis*; for if the defendant is so before plea, it is sufficient.

SECONDLY, It was argued at the bar, that this replication of traversing the inquisition is not good, for there never shall be a traverse UPON a traverse. But where the traverse in the bar takes from the plaintiff the liberty of his action, for the place, or time, or such like, there the plaintiff may maintain his action for the place or time, and may traverse the inducement to the traverse, and needs not to join with the defendant in the traverse, but, at his pleasure, may do the one or the other. But when the inducement is made and concluded with a traverse of a title shewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse. *Vide 10. Edw. 4. 3. & 49. 12. Edw. 46. 2. Rich. 3. "title Issue," 121. Dyer, 107.*—And of this opinion was THE WHOLE COURT.

In what cases a traverse upon a traverse, or after a traverse, or to the inducement of a traverse, shall be allowed. Ante, 61. Post, 173. 586. R. 518. Jones, 216. 328. Yelv. 225. Salk. 91. 510. Fort. 349. Strange, 117.

Co. Lit. 282. 303. Hob. 104. 154. Moor, 350. 428. 869. Vaugh. 61. Poph. 101. Carth. 99. 1. Saund. 21. 1. Lev. 192. 2. Lev. 112. Cro. Eliz. 671. 890. Cro. Jac. 86. Lut. 1438. 1630.

THIRDLY, It was resolved, that forasmuch as two titles are comprised in the bar for the king, viz. the dying seised, the heir within age, and the tenure in chivalry, whereby the wardship is vested in the king, and a title to present without office, that therefore, in the replication, they both ought to be answered, and it is not sufficient to traverse the inquisition, but she also ought to have answered to the tenure, and to the descent alledged of the manor, if the defendant had relied upon them; but because the defendant did not rely upon them, but made them inducements to the traverse of the grant, which is the plaintiff's title, that title ought to be maintained, and not to traverse the inducements to that traverse: wherefore for these causes it was adjudged for the defendant. *Vide 37. Hen. 6. pl. 6. 24. Edw. 3. pl. 27. 46. Edw. 3. pl. 25. 40. Edw. 3. pl. 11. 9. Hen. 6. pl. 37.*

In quare impedit declaring that A. B. being seised in fee presented, &c. if the defendant alledge title in the king by inquisition, and traverse the seisin, the plaintiff cannot traverse the inquisition, but must maintain his own title.

Co. Lit. 282, Moor, 428. Hob. 104. Poph. 101. Lut. 1438 1632. Joins

## CASE 7.

## Johns against Rowe.

If a *feme covert* die intestate, the ordinary is compellable to grant administration *de jure* of her goods and chattels to her husband or his representatives.

Jones, 175  
Co. Lit. 351. a  
1. Roll. Abr.  
910  
Moor, 871.  
4 Co. 51. b.  
Dyer, 51.  
1. Sid. 409.  
1 Salk. 21.  
1. Peere Wms  
381.  
Strange, 891.  
III. 1118  
3. Atk 526.  
2 Bl. om. 504.  
1 Com. Dig.  
26.

UPON a commission to JONES, *Justice*, WHITLOCK, *Justice*, YELVERTON, *Justice*, and MYSELF, and to four other doctors of law, in an appeal of administration committed by SIR HENRY MARTYN to Anne Rowe, niece to Elizabeth Johns, late the wife of Roger Johns, the husband pretended that of right it belonged to him, and not to any of his wife's kindred: and it was divers times debated, as well by common lawyers as by doctors of the civil law.

JONES, WHITLOCK, and YELVERTON, *Justices*, resolved, that of right the administration ought to be committed to the husband, and not to any of the wife's kindred, by the statute of 31. Edw. 3. c. 11. as to the most faithful friend; for as it belongeth to the wife upon the husband's dying intestate, so it belongeth more properly to the husband upon the wife's dying intestate: but they agreed that, the statute of 21. Hen. 8. c. 5. doth not extend to compel the husband to take administration; for that is a penal law, and extends only to the wife and kindred, and not by equity to be extended to the husband. And for their opinion they relied upon 4. Co. 51. b. *Ognell's Case*, that the administration of the goods of the wife belongeth in right to the husband.

But I doubted there f, and was of a contrary opinion: for the said book doth not give any reason, nor shew any authority to maintain it; and, in reason, the husband is not to have it *de jure*, but it is in the power of the ordinary to commit the administration to him or to the wife's kindred; for if he ought to have it *de jure*, he would never suffer the wife to make any will for the advancement of the children by another husband, or for her kindred; and the wife without the husband's assent cannot make a testament, but by his assent she may make him executor for things in action, as debts, or *des biens asport* before the coverture; so it is his default if she die intestate. Also the wife is to be intended to be advanced by her husband, and to have by the custom *rationabilem partem bonorum* (a); therefore he is not in such degree as his wife, and he is not *de jure* to have the administration, but the ordinary may commit it to him if he please, or he may refuse; and no appeal lies if the administration be not committed to him, for it is merely at the ordinary's discretion. And of this opinion were the civilians.

But afterwards, the said THREE JUSTICES, in my absence, resolved for the plaintiff (b). *Vide* 4. Hen. 6. pl. 31. 12. Hen. 7. pl. 24. 9. Co. 38. 24. Hen. 6. pl. 14. 27. Hen. 8. pl. 26. 39. Hen. 6. pl. 27. 18. Edw. 4. pl. 11.

(a) By 2. and 23. Car. 2. c. 10. she shall have a *third*, if there be children; if not, a moiety of her husband's personal estate.

(b) By 29. Car. 2. c. 3. the husband shall have administration.

## CASE 8.

Sir William Crayford against Sir Robert Crayford, Executor of William Crayford.

Hilary Term, 2. Car. 1. Roll 2418.

What shall be construed in absolute and independent covenant.

COVENANT. Whereas the testator covenanted with the plaintiff, That the manor of *Ridgway*, which he assured to the plaintiff upon his marriage, was of the value of three hundred pounds

pounds yearly; he saith, that in truth it is but of the yearly value of 250l. The defendant pleaded, That the said manor was of the value of 300l. yearly at the time of making the said indenture, *secundum formam et effectum indenturæ prædictæ*; and upon this they were at issue, and the jury find a special verdict, *viz.* The indenture *verbatim*, as the plaintiff declareth; wherein the testator covenanted to stand seised of that manor, in consideration of marriage, to the use of the plaintiff and the heirs of his body; and covenants that he was seised of the said manor at the date of the said indenture, of a lawful estate in fee, notwithstanding any act done by him or any of his ancestors, and that no reversion or remainder was in the king or any other, and that the said manor was "then of the annual value of 300l. *per annum*;" and that the plaintiff and his heirs shall enjoy according to the limitations, discharged and saved harmless from all incumbrances made by him or any of his ancestors. And further they found, that this manor was but of the value of 260l. *per annum* at the time of the said indenture, and no more, and that the testator had not done any act to impair the said value; and if *super totam materiam*, &c.

SIR W. CRAY-  
FORD  
against  
SIR R. CRAY-  
FORD.

So the sole question was, Whether this covenant for the value depends upon the first part of the covenant, that "notwithstanding any act made by the testator or his ancestors," or if it were an absolute and distinct covenant of itself?

Cro. Jac. 644.  
Cro. Eliz. 44.  
Post. 496.  
Moor, 58.  
Cowp. 125.  
Doug. 27. 766.

And upon the first argument THE COURT RESOLVED, that it was an absolute and distinct covenant, and had no dependence upon the first part of the covenant. *Vide* 27. Hen. 8. pl. 29. 7. & 8. Eliz. Dyer, 240. 1. Saund. 58.

### Sands against Trevilian.

CASE 9.

**E**RROR of a judgment in the common pleas in debt, where the plaintiff sued the defendant, Because he retained him, being an attorney in the common pleas, to prosecute such a suit in that court betwixt one *Sims* and *Worlich*, and designed him to be attorney for *Worlich*, and agreed to pay him his fees; and sheweth, that he laid out so much in that suit for *Worlich*, and that the defendant had not paid him. Upon *nil debet* pleaded, the verdict was found for the plaintiff, and judgment given.

The error assigned was, That an action of debt lies not; for the defendant is but a solicitor, and there is not any consideration; and it is maintenance in him to solicit suits. 32. Hen. 6. pl. 25. 21. Hen. 6. pl. 16.

**SECONDLY**, Although the defendant be suable for this retainer, yet it ought to be in an action upon the case in an *assumpsit*, and not in debt; for there is not any contract betwixt them.

And concerning this point THE COURT doubted, and would advise thereof (a).

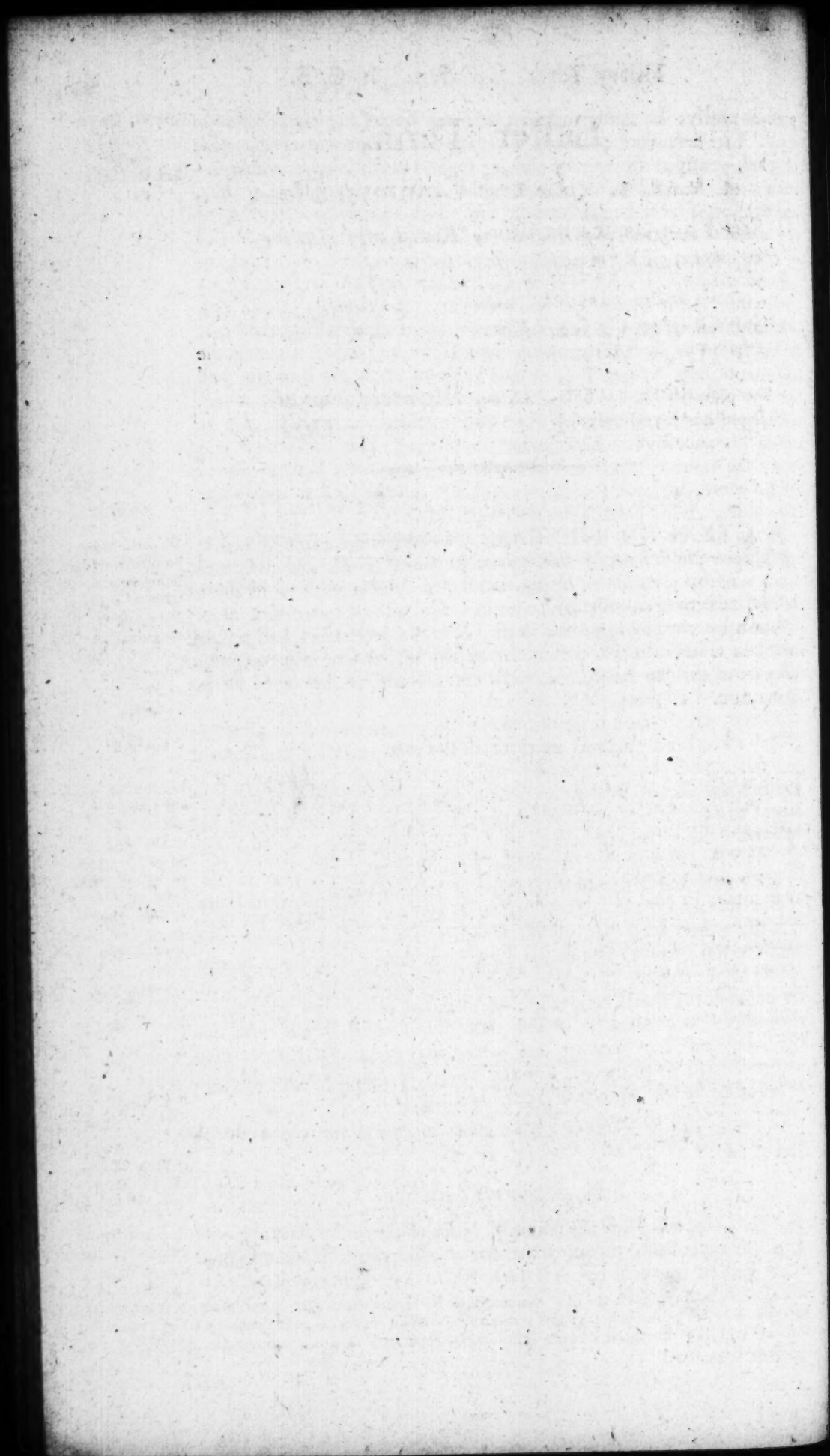
An attorney may bring debt on a retainer for his fees; but on a promise by one man to pay him for business done in the cause of another, case only lies.  
Post. 160. 194.  
See Bradford v. Woodhouse,  
Cro. Jac. 520.  
1. Com. Dig. 453.  
2. Ld Ray 842.  
1. Term Rep. 62.

(a) See post. 193. the judgment of the Court in this Case.

See 3. Jac. 1. c. 7. 2. Geo. 2. c. 23.

Easter





## Easter Term,

### 4. Car. 1. In the Common Pleas.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir Richard Hutton, *Knt*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

}

*Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Mynn *against* Coughton and his Wife.

CASE 1.

**A**CTION ON THE CASE. Whereas the plaintiff had recovered a debt of thirty pounds against *T. D.* and did thereupon sue forth a *capias ad satisfaciendum*, and delivered it to the sheriff of the county of *Cambridge*, who had arrested and taken him in execution by virtue of the said writ; that the defendants had rescued him out of the said execution, by means whereof he went at large, and cannot since be found, so as the plaintiff is defrauded of his execution.

Upon verdict found for the plaintiff, it was moved in arrest of judgment, that an action on the case lies not against the defendant for this *rescous* by the plaintiff who recovered, but his remedy is against the sheriff in debt or action upon the case, and the sheriff ought to have this action against the rescouffors; for there is not any reason the defendants should be twice punished, as they would if the plaintiff should maintain this action against them.

HUTTON and YELVERTON were of that opinion.

But RICHARDSON, *Chief Justice*, HARVEY, and MYSELF, held, that the action well lies for the plaintiff; for he is the party who hath the loss, and to whom the injury was done; wherefore in reason he ought to have the action, and not be enforced to sue the sheriff, for perhaps the sheriff is dead, and then no action lies against his executors: wherefore it is just that the plaintiff should take his election; and if he recover, the parties may plead it if they be sued by the sheriff, so as there is not any danger of being double charged. Wherefore it was adjudged for the plaintiff (*a*).

(a) See 2 Will. & Mary, c. 5. s. 4. goods distrained for rent may recover treble damages, &c.

Iseham *against* Morrice.

CASE 2.

**E**JECTMENT by the plaintiff, lessee of the *earl of Kent*, against the defendant, tenant to the *earl of Pembroke*. Upon evidence at the bar, it was held by ALL THE JUSTICES, Whereas EDWARD of two parts in three parts for life, remainder to *B.* of the third part in tail male; a recovery suffered by *B.* of all her moiety part and purparty in the said manor, is good, not only for the moiety of the third part, but for the third part, also.—S. C. Hetl. 81. Co. Lit. 46. b. 47. b. Cowp. 379. Term Rep. 105.

*earl*

ISEHAM  
against  
MORRICE.

*earl of Salop* was tenant for life of the manor of *Alveton* in the county of *Stafford*; remainder to *GRACE lady Candish* his sister, of two parts thereof in three parts to be divided, for life; the remainder of the third part to the said *Grace* and the heirs male of her body; the remainder over, &c. and she by indenture inrolled bargained and sold to the said *Edward* all her moiety part and purparty of the said manor, and covenants a recovery for further assurance, which is had accordingly, and *Grace* made the vouchee.

FIRST, That this was a good recovery of the intire third part, and not of the moiety of the third part, as it was strongly urged at the bar it should be.

A recovery for a greater portion of a manor than the party has, is good.

SECONDLY, That if one hath interest only in the third part of a manor, and suffer a recovery of the moiety of the manor, it is good for the third part.

2. Co. 4. b.

A void lease is good by estoppel, if the lessor purchase the inheritance; but the jury may find the fact.

Co. Lit. 227. 352.

THIRDLY, That where one makes a lease for years of land by indenture, and hath nothing in the land, and afterward purchaseth the land and aliens it, although it be a good lease for years by estoppel against him and his alienee by way of pleading, and shall bind them, yet it shall not bind the jury, but they may find the truth; and if they find the truth, the Court shall adjudge it to be a void lease.

2. Co. 4. b. 4. Co. 53. a. Owen, 96. Cro. Eliz. 140. 1. Leon. 206. Pollexf. 67. 3. Com. Dig. 278. 5. Com. Dig. 158. 1. Salk. 276.

Inrollment of bargain and sale will not make an intermediate lease good.

Post. 218.

FOURTHLY, That where bargainee by indenture, after the sealing of the indenture and before the inrollment, lets the same land for years, and afterwards the indenture is inrolled within the six months, yet the lease is void, and the relation of the inrollment shall not make it good.

Cro. Jac. 52.

Hob. 136. 220. Carth. 178. 2. Burr. 712. 1. Com. Dig. 541.

*Cestui que trust* of a term purchases the inheritance, and levies a fine, the lessee for years are barred.

5. Co. 124. Carth. 82. 102. Plow. 374.

FIFTHLY, That where one is lessee for years, and assigns over his lease in trust for himself, and afterwards purchaseth the inheritance and occupies the land, and then levies a fine with proclamation, and the trustee doth not claim his lease within the five years, this fine and non-claim shall bar the interest of the trustee; for he who levied the fine hath the possession by reason of the trust, and this trust is included in the fine, and the trustee not making his claim, his interest is barred thereby.

1. Vent. 56. 81. 1. Wilf. 242.

2. Vent. 329. 1. Sid. 458. Hardres, 401. 1. Lev. 270. 3. Bac. Abr. 448. Ch Rep. 51. Ambl. Rep. 699. R. 6. 250. 352. 431. Cruise on Fines, 193.

If a man bargain and sell land for years, and then grant the reversion, if the bargainee attorn to the grantee, it is a good grant of the reversion, although the bargainee had not entered.

Post. 400. Cro. Jac. 52. 604.

SIXTHLY, That where one by indenture, in consideration of money, bargaineth and selleth, demiseth and granteth, land for years, and the next day after, by indenture reciting that grant and demise, grants the reversion to divers uses, the lessee attorns, it is a good grant of the reversion, although there were not any proof that the bargainee entered before this grant of the reversion, or that the bargainor waived the possession; for the lessee shall be adjudged in actual possession by the statute of 27. Hen. 8. c. 16. of uses, and the reversion is immediately divided from the possession, and he hath a good reversion; but in case of a lease for years at the common law, until the lessee enters, or the lessor waive the possession, the reversion is not divided, nor passeth by the words of "grant of a reversion."

5. Co. 124. b.

Co. Lit. 147. b. 270. a. 2. Vent. 35. 2. Burr. 712.



Eaton *against* Ayloff and his Wife.

CASE 3.

**P**ROHIBITION was prayed, Because they sued in court-christian for defamation, and speaking these words of the plaintiff, "He was a cuckold and a wittal, which is worse than a cuckold, and that *Aylesworth* had lain with *Ayloff's* wife;" and for these defamatory words he sued there.

And because it was alledged, that for these words, being but words of spleen, prohibitions had been usually granted, day was thereupon given until this Term to shew cause why a prohibition should not be granted; and divers precedents were shewn, that for calling one "cuckold" or "whore", prohibitions have been granted.

But now upon advisement ALL THE COURT agreed, that no prohibition should be granted, but that the spiritual court should have jurisdiction thereof: for although they held, that there ought not to have been any suit for the first words, they being too general, yet being coupled with a particular, shewing that the wife committed such an offence with such a particular person, they are not now general words of spleen in common and usual discourse and parlance; but they held it was such a defamation as one is suable for in the spiritual court: whereupon the prohibition was denied.

BROWNLOW, Chief Prothonotary, produced several precedents where prohibitions had been granted to stay suits for such words, viz. in *Trinity Term*, 15. Jac. 1. Roll 2260. *Purcas v. Birrell*, for that he was presented at several inquests within his parish for being a drunkard and a barrator; and in *Easter Term*, 6. Jac. 1. Roll 397. a prohibition was granted to stay a suit for calling a parson a "hedge priest;" and *Michaelmas Term*, 21. Jac. 1. *Barker v. Pasmore*, for saying, "She is a quean, and a tainted quean," a prohibition was granted (a).

of *Cucko v. Starre*, post 285. and *Miller v. Herbert*, 1. Sid. 404. 1. Vent. 7.; and indeed it seems now to be settled, that a suit may be instituted in the spiritual court, not only for calling a woman a *whore*, *Graves v. Blanchet*, Salk. 696. but for publishing any words tantamount. *Str.* 471. 545. 955. *Carth.* 498. 3. Lev. 119. 11. Mod. 112.

To say of a woman "*she is a whore*," are words of heat, and not a defamation cognizable by the spiritual court, unless accompanied by the charge of some act of incontinency. *Sed quare.*

*Post* 339. 456. *Hetley*, 74. 2. Roll. Ab. 397. 2. Lev. 63. 66. *Jones*, 44. R. 770. 1. Sid. 248. 433. 1. Vent. 61. 220. 1. Mod. 21. *Stra.* 823. *Bunb.* 312. *Salk.* 692. *Skin.* 390. 4. Com. Dig. 507. 2. Term Rep. B. R. 474.

(a) See the Case

# Trinity Term,

## 4. Car. 1. In the Common Pleas.

*Sir Thomas Richardson, Knt. Chief Justice.*

*Sir Richard Hutton, Knt.*

*Sir Francis Harvey, Knt.*

*Sir George Croke, Knt.*

*Sir Henry Yelverton, Knt.*

*Sir Robert Heath, Knt. Attorney General.*

*Sir Richard Sheldon, Knt. Solicitor General.*

} *Justices.*

### CASE 1.

### Farrington against Keymer.

An information on 23. *Hen. 8. c. 4.* for raising the prices of beer, may be tried at *Westminster*; for the offence is not restrained by the 21. *Jac. 1. c. 4.* Post. 146. 603. Hetley, 101. Hutton, 98. 1. Sid. 401. 1. Ven. 8. 1. Com. Dig. 227.

Carth. 291. 465. A statute giving an action wherein no protection, essoin, &c. shall be allowed, extends only to the courts at *Westminster*. Moor, 421. 6. Co. 19.

The 21. *Jac. 1. c. 4.* does not enable justices of peace to proceed on subsequent penal statutes. 3. Inst. 193. 4. Inst. 172. 1. Com. Dig. 123. 1. Salk. 373.

Common brewers are not vic-tualers within the meaning of the 31. *Hen. 8. c. 10.*

**I**NFORMATION against the defendant upon the, 23. *Hen. 8. c. 4.* for selling beer at another price than is thereby appointed, which is, that "the offender shall forfeit six shillings for every barrel, &c. the one moiety to the king, the other to the party who will sue in any of the king's courts by action of debt, &c."

After verdict at *Norfolk* assises upon not guilty, and found for the plaintiff, it was moved in arrest of judgment, that this information was not maintainable in this court, for the statute of 21. *Jac. 1. c. 4.* appoints that informations shall be before the justices of peace for such matters whereof they have power to inquire, and not in the courts at *Westminster*; and so the statute being in the negative, the information is not here allowable.

But ALL THE JUSTICES resolved, *absente HARVEY*, that this information was well brought in this court.

**FIRST,** It was held, that the 23. *Hen. 8. c. 4.* which gives the forfeiture to be recovered in courts where no protection, essoin, &c. is allowable, extends only to the courts at *Westminster*, and not to any other inferior court, although *Westminster* be not named; for an inferior court cannot allow *protections*, or *gager de ley*, and therefore it cannot be sued before the justices of peace or *oyer and terminer*, as in *Gregorie's Case*, 6. Co. 19. and *Dyer*, 236.

**SECONDLY,** It was resolved, that the 21. *Jac. 1. c. 4.* makes not any new law to enable the justices of peace to meddle with informations which were not before appointed by the statutes to be inquired of before them and to be sued by informations, but only appoints, that where informations may be brought before them, or in the courts of *Westminster*, at their election, there they shall be brought, in the sessions before the justices of the peace or of *oyer and terminer* in the counties where the offence was committed, and that for the ease of the subjects who be defendants.

2. Term. Rep. 274. 3. Term Rep. 362. 4. Term Rep. 109.

**THIRDLY,** They all said, that the principal doubt in this Case was, Whether the 31. *Hen. 8. c. 10.* which appoints that justice of

peace may enquire, among other statutes, of and upon the statutes of victuals, victuallers, innholders, &c. extends to give them authority to receive informations upon the 23. *Hen. 8. c. 4.* and if brewers shall be said *victuallers* within this statute? And it was resolved that they should not; for the statute of 23. *Hen. 8. c. 4.* is not properly against brewers, who are but obliquely punished within that statute; and the words victuals and victuallers are properly to be applied and extended against the alehouse-keepers, who sell by retail and keep not the assise, and who by the purview of the statutes were enquirable before justices of peace, as the statutes of 23. *Edw. 3. c. 6.* and of 12. *Rich. 2. c. .* and other express statutes are; but justices of peace and *oyer & terminer* are not to enquire concerning this statute, which is suable in the courts of *Westminster* only. Wherefore for *this* cause it was adjudged for the plaintiff.

FARRINGTON  
against  
KEYMER.

## Norton against Fermer.

Case 2.

**P**ROHIBITION was granted to stay a suit for tithe of wood, upon surmise that the wood was spent in his house for firing; and shews, that the custom in the same parish is, that the owners of any house and land in the said parish who pay tithes to the parson, ought not to pay tithes of wood spent for fuel in their houses.

Wood cut for  
fuel or fences is  
titheable unless  
exempted by  
custom.  
Post. 166.

Issue being upon this custom, it was found for the defendant, and moved in arrest of judgment, that although it be found there is no such custom, yet he ought not to pay tithes for wood spent in his house, nor for fencing-stuff for hedges, but *per legem terræ* ought to be discharged of them.

Moor, 917.  
2. Keb. 628.  
2. Inst. 652.  
Dan. Ab. 597.  
Hetley, 110.  
Moor, 909 917.  
Cro. Eliz. 603.  
609.  
Cro. Jac. 575.  
1. Sid. 447.  
1. Vent. 75.  
Bunb. 98.  
3. Com. Dig. 94.  
Ambl. Rep.  
132.

But THE COURT resolved, that it is not *de jure per legem terræ* that any be discharged of them; for it is usual in prohibitions to alledge customs, as for hearth-penny, or by reason of other lands whereof he pays tithes, that he is discharged of that tithe, but not to alledge, that *per legem terræ* he is discharged. And the plaintiff here having alledged a custom, and being found against him, it was adjudged for the defendant, that consultation should be granted.

## Isabel Peel's Case.

Case 3.

**P**ROHIBITION was prayed by her against the ecclesiastical commissioners, for that it was by articles in that court objected against her, that she was aiding and assistant to Sir *H.* in the years 1622, 1623, until September 1624, to have familiar acquaintance with the *Viscountess Purbeck*, with whom he committed adultery, and that she was chief agent for their meetings at unseasonable times, by and through her private lodgings and passages, by means whereof they took their opportunities to commit adultery; for which offence she was by the said commissioners, upon the seventh day of February 1627, sentenced to be guilty of bawdry and lenocynie, and fined two hundred pounds to the king's use, and enjoined to make such a penitential acknowledgment in the *Savoy* church as the said commissioners should appoint, and to be imprisoned until she found sureties for the performance of all this

If the judges of  
an inferior court  
exceed the jurisdic-  
tion given to  
them by statute,  
any of the superi-  
or courts may  
grant a prohibi-  
tion.  
Ante, 47.

Post. 220. 582.  
S.C. Hutt. 107.  
5. Co. 51.  
Cro. Eliz. 684.  
4. Inst. 331.  
2. Brownl. 37.  
2. Hawk. P. C.

556. 559. Powel on Dev. 690. Cowp 424. 3. Term Rep. 3. 315.

sentence :



**PEEL'S CASE.** sentence: and for this cause she prayed a prohibition; for that by the general pardon, 21. Jac. 1. she was pardoned for these offences committed in the years 1622, 1623, to September 1624: and she avers, that she is not guilty of any offence since that time.

THE COURT thereupon granted a prohibition: for although the time after the pardon is mentioned in the sentence, yet it was for offences before the pardon, and so it stands well with the sentence; and the averment makes it material: admitting also that part of the offences were committed after the time mentioned in the pardon, yet the time being entire, and both the time before and after the pardon involved together,

HUTTON, *Justice*, conceived that a prohibition ought to be granted; and for this reason also, because she is sentenced to be imprisoned until she find sureties to perform the whole order, which is not warrantable: for although by the 1. Eliz. c. 1. s. 18. (a) the high commissioners may assess fines, or award imprisonment for an offence, yet they can neither commit any to prison for the fine, nor until the parties find sureties for the performance of their orders; but they ought to certify the fine into the exchequer, &c.

And HUTTON further said, it had been ruled in this court, that suits for adultery (unless such only as were exorbitant and notorious) ought to be brought before the ordinary in his spiritual court: neither doth a suit for alimony in the high commission court lie, for the commission is grounded upon the statute; and if they get commissions of and for other offences, then the statute appoints, they have no sufficient ground for their proceedings: and several cases were cited to that purpose, viz. the case of *Doctor Conward* (b), who being sued before the high commissioners for his wife's adultery, and for being pandar to her, a prohibition was granted; and *Condie's Case* of *Canterbury*, who being sued before the high commissioners upon the election of a clerk, a prohibition was granted, because they have not any jurisdiction for such matters; and one *Balam's Case*, suit being before them for battery, a prohibition was granted, for it is no such offence which the statute intends to be there suable: whereupon in the principal case a prohibition was granted after divers days debating, and chiefly upon the pardon, because it was not any of the offences excepted therein.—NOTE also, that *Elizabeth Ash* had a prohibition upon the same surmise, being joined in the same sentence.

(a) Repealed by 16. Car. 1. c. 11. s. 3.

(b) 2. Brownl. 37.

## Denn's Case.

CASE 4.

THE CASE was thus: *Thomas Denn* being seised of certain lands in fee, and possessed of divers goods, devised the same for the payment of his debts and legacies; and, they being paid, the residue and surplus thereof to his wife, who he made his sole executrix, and died; and his wife, surviving him, also died before probate or any election. The brothers and sisters of the woman laboured to get administration *cum testamento annexo*. The plaintiff, who was brother and heir to *Thomas Denn*, suggesting that the will was revoked, and that however the spiritual court had no cognizance of the probate of wills concerning lands, they not being testamentary, prayed a prohibition; which was granted: for when the question is, Whether a will made of lands and goods be revoked? it is properly triable at the common law; but if the question be, Whether a will of goods only be revoked? it is properly triable in the spiritual court; for they having cognizance of the principal matter, shall try also the accessories. And it was said at the bar, that they in the spiritual court will deny the plea of the revocation of a will, or at least will enforce to prove it by such witnesses as are not to be excepted against in their law, as servants, or kindred, or legataries, and yet those witnesses are allowable at the common law: and being prayed that the prohibition might be granted to extend only *quoad* the lands, it was denied, and was granted generally for both; for when it is one entire will of lands and goods, and the allegation is to revoke it entirely, it shall not be denied in the prohibition: but if one make several wills, one of his land, another of his goods, and revocation is alledged of both, there a prohibition shall be granted for the one, and denied for the other.

The spiritual court shall not be prohibited from ascertaining the validity of a will for things personal, though land be also thereby devised; but they cannot meddle with a will of lands only.  
 Ante, 94.  
 Post. 165. 396.  
 Hetley, 113.  
 Jones, 223.  
 6. Co. 23. b.  
 Cro. Jac. 346.  
 1. Roll. Ab. 21.  
 2. Roll. Ab. 315.  
 Palmer, 120.  
 Salk. 552.  
 Hard. 313.  
 1. Mod. 90.  
 4. Com. Dig. 511.  
 Cowp. 424.  
 2. Term Rep. 473.  
 3. Term Rep. 315.

## Brown against Hancock.

CASE 5.

ASSUMPSIT. After verdict for the plaintiff, it was moved in arrest of judgment, that the promise is alledged to be made beyond the time limited in the statute of 21. Jac. 1. c. 16. and the action is not brought within the time limited thereby.

ALL THE COURT held, that if it appear so by the plaintiff's own shewing, that the action is not brought within the time limited by the statute, the plaintiff cannot maintain his action, but judgment shall be given against him: or if the contract in the *assumpsit* or *debt* be alledged to be within the time limited by the statute; and upon "*non debet*" or "*non assumpsit*" pleaded, it appears upon the evidence (a) that the *assumpsit* or contract was beyond the time limited, the action lies not, and the defendant shall take advantage thereof, if it be specially found by the jury; for the statute is in the negative, "that he shall not maintain such an action but within the time limited by the statute:" but in the principal case it appeared upon the view of the record, that the action was brought within the time limited; and therefore it was adjudged for the plaintiff.

In *assumpsit*, if it appear by the declaration that the cause of action did not arise within *six* years, the action cannot be maintained.  
 Hetley, 111.  
 1. Vent. 191.  
 1. Lev. 101.  
 1. Com. Dig. 154.  
 Dougl. 654.  
 3. Term Rep. 124.

(a) See *vide* Bull. N. P. 148. that the statute must be pleaded.—See *vide* p. 160. 1. 3. 294. contra.

## CASE 6.]

Homes *against* Savill.

*Assumpsit* upon  
"an account  
"stated" need  
not specify the  
particular mat-  
ters and causes  
of which it is  
composed.

Ante, 6. 31.

S. C. Hetl. 106.  
113.

Hob. 88.

Poph. 177.

Latch. 141.

Palm 432.

Yelv. 70.

Roll. Rep. 306:  
596.

Cro. Jac. 69. 207.

Dougl. 4. 727.

1. Term Rep. 41.

2. Term Rep.

479.

**A**SSUMPSIT. Whereas divers reckonings and accompts were between the plaintiff and defendant, and at such a day, year, and place, they *in simul computaverunt* for all debts, reckonings, and demands; and the defendant upon the said accompt was found to be the sum of twenty pounds in arrear to the plaintiff; in consideration whereof he promised to pay to the plaintiff the said debt, &c. That the defendant *licet sapius requisitus* had not paid, *per quod actio ei accrevit, &c.*

The defendant pleaded *non assumpsit*; and it was found against him: and it was moved in arrest of judgment, that this action is not maintainable; for he ought to have specified the particular matter and causes, *viz. pro mercimoniis venditis*, or otherwise; wherefore he should have an accompt, otherwise it lies not.

But THE WHOLE COURT delivered their opinions to the contrary, that forasmuch as the accompt may be for divers causes, and several matters and things may be included and comprised therein, which *in pede compoti* is reduced to a sum certain, wherein it certainly appears he remains and stands indebted, it is a sufficient ground to maintain the action, without expressing the particulars for which they accompted: for proof whereof divers precedents were produced where such actions brought have been adjudged good. Whereupon judgment was given for the plaintiff.

## CASE 7.

Taylor *against* Page.

After *quod com-  
putet* in an ac-  
tion of accompt  
nothing shall be  
allowed as a dis-  
charge before  
auditors which  
might have been  
pleaded to the  
action.

Lut. 52.

S. C. Hetl. 114.

1 Roll. 87 126.

Bull. N. P. 128.

Cro Eliz. 830.

Strange, 680.

5. Wilf. 73. for

what may be

pleaded before

Cowp. 728.

**A**CCOMPT, upon receipt of divers sums. The defendant pleaded "*nunques son receivor*;" and found against him: and, being adjudged to account before auditors, he pleaded, that after the receipt, and before the action brought, he had put himself in arbitrament for all trespasses, debts, accounts, and actions, &c. who arbitrated, that he should pay ten pounds only in discharge of all trespasses, debts, accounts, and actions; which he paid accordingly.

Whereupon it was demurred:

And without argument ADJUDGED for the plaintiff: for this arbitrament before the action ought to have been pleaded in bar of the action; which being omitted, he hath lost the advantage thereof, and shall never plead it before the auditors. Whereupon it was adjudged for the plaintiff. *Vide 22. Hen. 6. pl. 55. 1. Edw. 5. pl. 2. 21. Hen. 7. pl. 31.*

auditors. See 1. Com. Dig. "Accompt," (E. 11. 12. & 13.) and 1. Bac. Abr. 21.



AFTER  
Trinity Term,

117

4. Car. 1. In Serjeants-Inn Hall,

AT A

MEETING OF THE TWELVE JUDGES.

THE KING'S BENCH.

Sir Nicholas Hyde, *Knt.* Chief Justice.

Sir John Doderidge, *Knt.*

Sir William Jones, *Knt.*

Sir James Whitdock, *Knt.*

Justices.

THE COMMON PLEAS.

Sir Thomas Richardson, *Knt.* Chief Justice.

Sir Richard Hutton, *Knt.*

Sir Francis Harvey, *Knt.*

Sir George Croke, *Knt.*

Sir Henry Yelverton, *Knt.*

Justices.

THE EXCHEQUER.

Sir John Walter, *Knt.* Chief Justice.

Sir Edward Bromley, *Knt.*

Sir John Denham, *Knt.*

Sir George Vernon, *Knt.*

Sir Thomas Trevor, *Knt.*

Justices.

The Case of Hugh Pine, Esq.

CASE I.

**W**ILLIAM COLLIER, attending *Mr. Pine* at his house in the country, was demanded of him, Whether he had seen the king at *Hinton*, or no? *Collier* answered, That he had seen the king there. *Mr. Pine* replied, "Then hast thou seen as unwise a king as ever was, and so governed as never king was; for he is carried as a man would carry a child with an apple; therefore I and divers more did refuse to do our duties to him."

After which words spoken, *William Collier*, meeting with *Richard Collier* his brother, asked him, Whether the king were not a wise king? who answered, "Yes, he was a wise and temperate king."

After which, at another time, *Monsieur Sabiza* being at *Mr. Pawlett's* house, at *Hinton*, *Mr. Pine* asked *Collier*, Whether the king was there, or no? who answered, that he heard he was. *Mr. Pine* replied, That he could have had him at his house, if he would, as well as *Mr. Pawlett*.

At another time one *George Morley*, a locksmith, being at *Mr. Pine's* house, he asked him, "What news?" whereunto he answered, That he heard the king was at *Mr. Pawlett's*, at *Hinton*. Then *Mr. Pine* said, "That is nothing; for I might have had him at my house, as well as *Mr. Pawlett*, for he is to be carried any whither." And then *Mr. Pine* said aloud, "Before God, he is no more fit to be king than *Hickwright*." This *Hickwright* was an old simple fellow who was then *Mr. Pine's* shepherd.

These words being thus proved by *William Collier* and *George Morley*, all the Judges were commanded to assemble themselves, to consider and resolve what offence the speaking of those words were.

Speaking words in contempt or disgrace of the king's person, importing personal vice or moral defect, is not an overt act of compassing or imagining his death; for words spoken of the king, except they are relative to some treasonable act or design then in agitation, cannot of themselves be high treason, but amount to a misdemeanor only.

2. Roll. 89.

1. Hale P. C.

118.

3. State Trials,

733.

Foiler, 195. 202.

312.

1. Hawk. P. C.

57 93.

1. Bl. Rep. 37.

Salk. 631. 4. Bl. Com. 85.

## PINZ'S CASE.

Whereupon SIR NICHOLAS HYDE, *Chief Justice* of the king's bench; SIR THOMAS RICHARDSON, *Chief Justice* of the common pleas; SIR JOHN WALTER, *Chief Baron* of the exchequer; SIR WILLIAM JONES, one of the justices of the king's bench; SIR HENRY YELVERTON, one of the justices of the common pleas; SIR THOMAS TREVOR, and GEORGE VERNON, barons of the exchequer, none other of the justices being then in town, met at *Serjeants-Inn*, in *Fleet-street*, where they debated the case amongst themselves, in the presence of SIR ROBERT HEATH, the attorney general; and divers precedents were then produced, *viz*,

## CASE 2.

## The Case of Juliana Quick.

KANC,

*Anno vicefimo primo Henrici Sexti.*

To accuse the king of having committed murder was formerly high-treason.

JULIANA filia WILLIELMI QUICK, et alii falsi proditores incogniti in occulto machinantes mortem regis, &c. prædicta JULIANA ex assensu WILLIELMI, et aliorum proditorum ignotorum, eidem domino regi, ut fuit equitans in via adhefit, et dixit eidem domino regi, "HARRY OF WINDSOR, ride soberly, thy horse may stumble and break thy neck." And when the noble John Beauchamp then said to her, "To whom speakest thou?" she answered, "To that proud boy in red, riding on horseback," pointing with her hand to the said king. And further calling out to the said king, said, "It becometh thee better to ride to thy uncle, than that thy uncle should ride to thee; thou wilt kill him, as thou hast killed thy mother: send to thy uncle's wife, whom thou keepest from him. Thou art a fool, a known fool throughout the whole kingdom of England." She had *pain fort et dure* because she would not plead (a).

3. Inst. 14.

(a) A prisoner standing mute in high-treason is *ipso facto* attainted. 2. Hale, and piracy such obstinacy amounts to a conviction, by 12. Geo. 3. c. 20. See 2. 286. 4. Bl. Com. 348.—And in felony Hawk. P. C. ch. 30. 8vo. edit.

## CASE 3.

## Thomas Kerver's Case.

BERKSHIRE.

*In the twenty-first year of Hen, 6.*

Indictment for accusing the king of being unequal to the duty of his office, and neglecting the interests of his kingdom.

THOMAS KERVER *indictatur, pro eo quod ipse proditorie dixit verba sequentia*, "Woe to the kingdom where a child is king." *Et iterum dixit*, "It had been better for the kingdom of England by an hundred thousand pounds, if the said king had been dead twenty years before." *Et iterum*, "It had been better for the said kingdom by an hundred thousand pounds, if the said king never had been born." And, "That the Dauphin of France was in Aquitain and Gascoyn, with a great power, and valiantly fighting, possessing himself of the land of the king of England in Aquitain and Gascoyn. And if the said king were but of as much humanity as the Dauphin, who is of his age, the said king might quietly and peaceably hold and enjoy his said lands." To this he pleaded *not guilty*, and was committed to the constable of the Tower of London; and afterward recommitted to Wallingford Castle.—*Ideo nil ultra apparet.*

John

## John Clipsham's Case.

Case 4.

SUSSEX.

*In the twenty-ninth year of Hen. 6.*

**JOHANNES CLIPSHAM** indictatur, pro eo quod ipsi et alii dixerunt, quod dominus rex non fuit de potestate, nec scientia, ad regnum ANGLIÆ gubernandum, et quod noluerunt ulterius obedire regi, nec gubernationi suæ, infra idem regnum; minantesque inter se veros populos domini regis de comitatu KANCIÆ, pro eo quod ipsi noluerunt resistere ipsum regem de iustitia sua infra eundem comitatum, ac similiter insurrexerunt, &c.

Indictment for saying that the king has not sufficient knowledge, &c.

## The Mirfields' Case.

Case 5.

SUSSEX.

*In the twenty-ninth year of Hen. 6.*

**JOHANNES MIRFIELD et WILLIELMUS MIRFIELD** indictantur, pro eo quod dixerunt, "That the king was a natural fool, and would oftentimes hold a staff in his hand, with a bird over the end, playing therewith as a fool; and that another king must be ordained to rule the land; saying, That the king was not a person able to rule the land." Et ulterius dixerunt, "That the charter that the king made at the first insurrection was false; and that he and his fellowship would arise again; and when they were up, they would not leave any gentleman alive but such as they list, &c."—Per indictmentem. session. SUSSEX.

Indictment for saying that the king was a natural fool, &c.

## Brettenham's Case.

Case 6.

NORFOLK.

*In the thirty-first year of Hen. 6.*

**WILLIELMUS BRETENHAM** generosus indictatur, pro proditoriis verbis, viz. quod RICHARDUS DUX EBORUM extra terram HIBERNIÆ infra quindecim dies tunc proxime sequentes veniret et coronam dicti domini regis de eodem rege auferret, et illud suum per caput ejusdem ducis infra brevi poni faceret."—NOTATUR in margine indictmenta sic, trespas enormia, contempt. et alia offence. Tamen in indictmenta est "proditorie loquebatur, &c."

Indictment for saying that a pretender to the throne would seize the crown &c.

## William Ashton's Case.

Case 7.

SUFFOLK.

*In the thirty-first year of Henry 6.*

**WILLIELMUS ASHTON** miles indictatur, pro eo quod ipse et alii proditorie diversas hillas et scripturas in rythmis et balladis factas et fabricatas, super ostia et fenestras diversorum hominum posuerunt, recitantes in eisdem, quod dominus rex, per consilium DUCIS SUFFOLCIÆ, EPISCOPI SARUM, EPISCOPI CICESTRIÆ, DOMINI DE BAY, et aliorum de concilio domini regis existent. vendidit regna ANGLIÆ et FRANCIÆ; et quod REX FRANCIÆ, avunculus regis, regnaret super dictum regem, dicentes et scribentes hæc omnia et singula. Et similiter miserunt literas hominibus de KANC. ad insurgendum erga regem, ad adiuvandum DUCEM EBORUM, &c. ad guerram levandum. — Per indictmentem Suff. anno 31. H. 6.

Indictment for high-treason for composing and publishing songs purporting that the king had sold the nation, &c.



Case 8.

## John Gayle's Case.

ESSEX.

In the thirty-fourth year of Hen. Sexti.

Indictment for  
saying that the  
king and his  
privy council  
were false, &c.  
&c. &c.

**JOHANNES GAYLE** indictatur, pro eo quod ipse et ALII dixerunt, quod "dictus rex, et omnes domini sui circa personam suam, et concilium suum, falsi sunt, et quod ipsi petitiones suas, in ultimo parlamento dicti regis, apud WESTMONASTERIUM tentum, per ipsos et totam communitatem KANCIE petitionat. &c. in vitis dentibus dicti regis habere voluerunt: et quod non licet episcopis dicti regni ullam potestatem, nec aliquam congregationem populi erga ipsos ad perturbandum de bonis propositis suis perimplendis, assemblare, nec retinere. Quodque presbyteri totius ANGLIÆ nulla bona nec catalla, præter cathedram et candela-brum, ad inspiciendum super libros suos haberent et possiderent. Ac quod **JOHANNES MORTIMER**, alias CADE, est vivens; et quod ipse esset eorum capitalis capitaneus in omnibus propositis suis perimplendis, credentes, et dicentes, quod ipsi essent infra tres dies quinque millia hominum armatorum: et similiter guerram erga regem levarent."—Habuerunt chartam allocationis eodem Termino.

Case 9.

## Oliver Germaine's Case.

WILTSHIRE.

In the second year of Edw. 4.

Indictment for  
saying a king de  
facto, and not  
de jure, was the  
rightful king,  
&c.

**OLIVERUS GERMAINE**, taylor, et alii falsi proditores, machinantes et proponentes quomodo regem EDVARDUM, &c. destruerent potuerunt; et **HENRICUM SEXTUM**, nuper DE FACTO, et non DE JURE, regem ANGLIÆ, inimicum regis ANGLIÆ, autoritate parlamenti reputat. et approbat. infra regnum ANGLIÆ, extra regnum SCOTIÆ reducere, et regem EDVARDUM deponere, &c. mortem regis compasser, &c. credentes et dicentes inter se, in prophesiis, ut falsi heretici, quod dominus **HENRICUS**, nuper rex, infra breve esset eorum rex in regno ANGLIÆ sicut prius, et coronam suam in eodem regno haberet et retineret, dicentes hæc omnia ea intentione, quod veri populi domini regis cordialem amorem extraherent.—JUDGMENT, to be hanged, drawn, and quartered.

Case 10.

## William Belmyn's Case.

NORFOLK.

Anno nono Edvardi Quarti.

Indictment for  
making and  
publishing cer-  
tain articles,  
&c.

**WILLIELMUS BELMYN**, de Nprwico, mercer, indictatur, quod cum **ROBERTUS** de Ryddesdale, à diuturno tempore proponens statum et dignitatem regis EDVARDI QUARTI, &c. adnihilare, &c. et ipsum regem per guerram, &c. de regali, &c. privare, &c. inter alias falsas prodiones, &c. diversos articulos proditorum, &c. fabricavit, publicavit, et proclamavit. Et quod prædictus **WILLIELMUS** quandam scedulam tenorem prædictorum articulorum continent. apud N. &c. monstravit et publicavit, et eosdem articulos pro bonis articulis, et communi utilitate regni expedientes affirmavit, et quamplures personas ad ipsos articulos manutenendum et approbandum excitavit.—NOTA, Non dicitur PRODITORIE in eodem indictmento.

The

## The Case of Thomas Burdet.

CASE II.

WARWICK.

Anno decimo septimo Edwardi Quarti.

**F**URATORES præsentant, quod THOMAS BURDET, nuper de ARROW, in comitatu WARWICI, armiger, Deum præ oculis non habens, et debitum legianciæ suæ minime ponderans, ex malitia præcogitata, diabolica instigatione seductus, vicesimo die Aprilis, anno regni REGIS EDVARDI QUARTI, post Conquestum decimo quarto, et per diversas vices postea, apud villam WESTMONASTERII, in comitatu MIDDLESEXIAE, falso et proditorie, contra legianciæ suæ debitum, mortem et destructionem ipsius regis imaginavit compassus fuit et circumvit, ac ipsum regem falso et proditorie adtunc et ibidem interficere proposuit, et ad illud falsum nefandum propositum suum perimplendum, falso et proditorie laboravit et procuravit quosdam JOHANNEM STACY, nuper de OXONIA, in comitatu OXON, generosum, et THOMAM BLAKE, nuper de OXON, in comitatu OXON, clericum, apud villam WESTMONASTERII prædictam duodecimo die Novembris tunc proxime sequent. ad calculandum et laborandum de et circa nativitatem dicti domini regis et EDVARDI filii sui primogeniti, principis WALLIÆ, et de morte eorundem domini regis ac principis ad sciendum quando iidem Rex et EDVARDUS filius ejus morientur. Dictique JOHANNES STACY et THOMAS BLAKE, scientes illud falsum et nefandum propositum prædicti THOMÆ BURDET, ipsi JOHANNES STACY et THOMAS BLAKE, dicto duodecimo die Novembris, apud villam WESTMONASTERII prædictam, falso et proditorie mortem ipsorum regis et principis imaginaverunt et compassi fuerunt, ac ipsos regem ac principem adtunc et ibidem interficere proposuerunt. Et postea, sexto die Februarii, dicto anno decimo quarto, apud villam WESTMONASTERII prædictam, prædicti JOHANNES STACY ac THOMAS BLAKE eorum falsum et proditorium propositum perimplendum, falso et proditorie laboraverunt et calculaverunt per artem magicam, nigromanciam, et astronomiam, in mortem et finalem destructionem ipsorum regis ac principis. Et postea, scilicet, vicesimo die Maii, anno regni dicti regis decimo quinto, apud villam WESTMONASTERII prædictam, prædicti JOHANNES STACY et THOMAS BLAKE, falso et proditorie artibus prædictis laboraverunt; licet juxta determinationem sacram sanctæ ecclesiæ ac doctrinam diversorum doctorum, cuilibet ligo domini regis, de intromittendo de regibus et principibus, in formâ prædictâ, absque eorum voluntate, et præceptis inhibitu fuit. Et postea, iidem JOHANNES STACY et THOMAS BLAKE, ac prædictus THOMAS BURDET, apud prædictam villam WESTMONASTERII, vicesimo sexto die Maii, eodem anno decimo quinto, cuidam ALEXANDRO RUSSETON, et aliis de populo domini regis, falso et proditorie manifestaverunt et dixerunt, "quod per calculationem et artes prædictas, per ipsos JOHANNEM STACY et THOMAM BLAKE, in formâ prædictâ factas, iidem rex et princeps non diu viverent, sed infra breve obierent;" ad intentionem quod per detectionem et hujusmodi materiæ manifestationem, populi ipsius regis magis ab ipso rege cordiallem amorem retraherent; et idem dominus rex per notitiam illarum detectionis et manifestationis, tristitiam inde caperet et abbreviationem vitæ suæ. Ac quod prædictus THOMAS BURDET, mortem et destructionem ipsius regis supremi dicti domini sui et prædicti domini principis, ac subversionem legum suarum per guerram et discordiam inter ipsum regem et ligeos suos in regno prædicto movendum, sexto die Martii, anno regni dicti regis decimo septimo, apud HOLBORN, in comitatu MIDDLESEXIAE, falso et proditorie imaginavit, compassus fuit, et circumvit, ac ipsos regem ac principem

To cast and calculate by magic arts the nativity of the king or heir apparent, in order to find out the time of their death, and in consequence of such enquiries to publish that they should soon die, with a view to alienate the affections of their subjects, was a compassing and imagining of the death of the king, &c.

Co P. G. 6.  
1. Hale, 115.  
4. Bl. Com. 80.

3. Inst. 6.  
23. El. c. 2.

History of Croy  
land, p. 561.  
Stowe, p. 430.

BURDET'S  
CASE.See 3. vol.  
Hume's Hist.  
Eng. p. 473.

*cipem interficere proposuit. Et ad illud falsum nefandum propositum suum finaliter perimplendum, prædictus THOMAS BURDET diversas billas et scripturas in rythmis et balladis de murmurationibus seditionibus et proditoriis excitationibus, factas et fabricatas apud HOLBORN, et villam WESTMONASTERII prædict. falso et proditorie dispersit, projecit, et seminavit dicto sexto de Martii, ac quinto et sexto diebus Maii, dicto anno decimo septimo, ad intentionem quod populi domini regis cordialem amorem ab ipso rege retraherent ac ipsum relinquerent, ac erga ipsum regem insurgerent, et guerram erga ipsum regem levarent, in finalem destructionem ipsorum regis ac domini principis, et contra liganciam suam, necnon contra coronam et dignitatem ipsius regis. — JUDGMENT, to be hanged, drawn, and quartered.*

## CASE 12.

## The Case of John Alkerter.

KANC.

Anno decimo octavo Edwardi Quarti.

Indictment for  
saying that Edward the fourth  
procured the  
death of the  
duke of Clarence, &c.

**J**OHANNES ALKERIER, yeoman, nuper serviens RICHARDI comitis WARWICI ET SARUM, a diuturno tempore proponens statum regis pejorare et de regimine, &c. quantum in se fuit proditorie; per diversa verba nefanda, et alia dicta sua venenosa, de diversis murmurationibus seditionibus proditorum excitationibus factis et fabricatis, a gubernatione privare, &c. ad intentionem quod populi ejusdem regis cordialiter amorem retraherent, per discordiam inter regem et populum suum movendum, proditorie dixit WILLIELMO PEND, WILLIELMO FOWLE, et SAMPSONI HALK, sub hac forma, viz. quod WILLIELMUS PEND et JOHANNES ALKERTER olim servientes dicti RICHARDI comitis WARWICI fuerunt, et nunc quod idem comes diem suum clausit extremum; et hoc non obstante infra breve haberent comitem OXONIÆ (qui superstes est) infra hoc regnum ANGLIÆ, qui in futuro parcellam hujus patriæ gubernet; affirmans que ulterius verba iuacundam GALFRIDO PEKE, quod EDVARDUS quem vos vocatis regem ANGLIÆ falso fuit, &c.; dicendo, quod idem EDVARDUS per subtilem artem suam eundem COMITEM WARWICI interfecit et murtheravit, ac fratrem suum, nuper DUCEM CLARENCIÆ, ad mortem simili modo traxit, non habens causas nec aliquam veritatem; et dicendo, quod quicumque inheritabilis sit directe post mortem naturalem HENRICI DEXTI (nunc de facto, et non de jure, REGIS ANGLIÆ); ad coronam ANGLIÆ ille tantummodo sineret et suus homo esset. Et multa alia hujusmodi verba proditorie dixit. — UTLAGATUS FUIT, prout patet per rotul. session. Kanc. anno 18. Ed. 4.

## CASE 13.

## Thomas Hever's Case.

KANCIAE.

Anno decimo octavo Edwardi Quarti.

Indictment for  
saying that the  
parliament were  
more than any  
former parliament,  
&c.

**T**HOMAS HEVER indictatur, pro eo quod proditorie dixit, "Quod ultimum parlamentum domini regis, apud WESTMONASTERIUM tentum, magis simplex et insufficiens fuit quam unquam antea." Et ulterius, "Quod dominus rex proposuit moram suam infra comitatum KANCIAE trahere et amorem ligearum suorum ibidem habere, quia amorem cordialiter infra eandem civitatem non habuit, nec in futuro habebit: et quod si episcopus BATHONIENSIS morietur, quod tunc immediate THOMAS archiepiscopus CANTUARIENSIS et cardinalis ANGLIÆ caput suum amitteret." Et multa diversimoda verba proditoria de rege quam alia verba malitiosa de dominis suis tam spiritualibus quam temporalibus. — UTLAGATUS, prout patet per rotul. sessionis.

Collingbourn's



## Collingbourn's Case.

CASE 14.

LONDON:

Hilar. añ. secun. Ricardi Tertii.

**WILLIELMUS COLLINGBOURN**, nuper de **LYDYARD**, in comitatu **WILTS**, armiger, et alii falsi proditores, mortem regis et subjectionem regni proditorie imaginaverunt et compassi fuerunt: et ad illud perimplendum, excitaverunt, &c. quendam **THO. YATE** ei offerendo octo libras ad partes transmarinas exire. ad loquendum ibidem cum **HENRICO** nuntiante se comit. **RICHMUNDIÆ**, et aliis, &c. proditorie attinē. per parlamentum, &c. ad dicendum, quod ipsi cum omni potestate, &c. revenirent in **ANGLIAM** citra festum **Sancti LUCE** Evangelistæ, et totum integrum redditum totius regni **ANGLIÆ**, de Termino **Sancti Michaelis**, &c. in eorum relevamen haberent. Et ulterius, ad demonstrandum eis, quod per concilium ipsius **WILLIELMI COLLINGBOURN**, si dictus comes **RICHMUNDIÆ**, et alii, &c. ad terram **ANGLIÆ**, apud **POOLE**, in comitatu **DORCESTRIÆ**, arrivare voluerunt, ipse **WILLIELMUS COLLINGBOURN** et alii proditores, eis associando commotionem populi ipsius regis, insurrectionem et guerram erga ipsum regem interim levare causarent; et partem ipsorum falsorum proditorum contra regem in omnibus acciperent; et omnia infra regnum **ANGLIÆ** ad eorum dispositionem essent. Et ulterius, ad dicendum et demonstrandum dictis proditoribus, &c. ad destinandum **JOHANNEM CHEYNEY** usque ad regem **FRANCIÆ**, ad demonstrandum sibi, quod ambassatores sui in **ANGLIAM** a dicto rege **FRANCIÆ** venientes defraudari debeant; et quod rex **ANGLIÆ** nullum promissum eis custodiret, sed solummodo ad deponendam seu ad respectuandum guerram inter dominum regem tempore hyemali, eo quod in principio temporis æstivalis **ANGLICA** potestas in omnibus preparari possit ad bellum dicto domino regi **FRANCIÆ** præbendum, & eundem regem & terram suam adtunc finaliter destruendo. Et ulterius ad advisandum ipsum regem **FRANCIÆ** ad auxilium dictorum proditorum pecuniis, &c. ut ipse iter regis **ANGLIÆ** usque terram **FRANCIÆ** impedire proponet. Et sic prædictus **WILLIELMUS COLLINGBOURN** & alii fuerunt proditorie adhærentes, &c. Et quod prædictus **WILLIELMUS COLLINGBOURN**, et alii falsi proditores, Deum præ oculis, &c. a diuturno tempore intendens per covinam assensum et voluntatem diversorum aliorum proditorum eisdem proditoribus adhærentium, &c. associaverunt; et mortem regis per guerram, commotionem, et discordiam inter regem et ligeos suos infra regnum **ANGLIÆ** levandum, compassi fuerunt, &c. Et ad illud perimplendum, prædictus **WILLIELMUS COLLINGBOURN**, et alii, diversas billas et scripturas in rythmis et balladis de murmurationibus, seditiionibus, et loquelis, et proditoriis excitationibus, falso et proditorie fecerunt, scripserunt, et fabricaverunt, et illas per ipsos sic factas, scriptas, et fabricatas, die, &c. super diversa vñia ecclesiæ cathedralis sancti **PAULI**, **LONDON**. proditorie posuerunt, et publice ibidem fixerunt, ad movendum et excitandum ligeos regis billas et scripturas illas legentes et intelligentes, commotionem et guerram erga ipsum regem facere et levare, contra ligeanciam suæ debitum, et finalem destructionem regis, et subversionem regni, &c. — JUDGMENT, to be hanged, drawn, and quartered.

Bagnall's

## CASE 15.

## Bagnall's Case.

LONDON.

Anno nono Henrici Septimi.

Indictment for  
publishing  
poems and bal-  
lads to the dis-  
grace of the  
king and his  
council.

**T**HOMAS BAGNALL et ALII mortem regis imaginaverunt, &c. et ad intentionem prædictam, quod populi regis cordialem amorem retrahere, &c. diversas billas et scripturas in rhythmis et balladis de murmurationibus, seditionibus, et proditoriis excitationibus, tam versus regem quam alios magnates de consilio suo tangent. proditoriè fecerunt, &c. super ostium ecclesiæ sancti BENEDICTI in Gracious-street, et super LE STANDARD IN CHEAP, ac super ostium ecclesiæ PAULI posuerunt, &c. et quod ipsi fuerunt adhaerentes cuidem PETRO WARBECK, inimico regis, in partibus transmarinis existent. ad levandum guerram ad deponendum regem.—JUDGMENT, to be hanged, drawn, and quartered.

## CASE 16.

## Stanley and Clifford's Case.

MIDDLE.

Decimo Henrici Septimi.

Stanley and  
Clifford's Case.

Bak. Hist. 136.

Godb. 268.

I. Hale, 118.

**W**ILLIELMUS STANLEY, miles, et ROBERTUS CLIFFORD, miles, ad invicem inter se communicaverunt et interlocuti fuerunt de quodam PETRO WARBECK de THORNACO sub obedientia archiducis AUSTRIÆ et BURGUNDIÆ, inimico domini regis, &c. falsè nuncupante se fore RICHARDUM secundum filium domini EDVARDI nuper regis ANGLIÆ quarti, in partibus exterioribus ultra mare existent. ac mortem, &c. regis, ac subversionem regni ANGLIÆ, proditoriè conspiraverunt, &c. et eundem regem per guerram, &c. in regno ANGLIÆ, levandum de coronâ, &c. deponendum, &c. Et ad illud perimplendum, &c. prædicti WILLIELMUS STANLEY et ROBERTUS CLIFFORD proditoriè, &c. inter se aggregati fuerunt, quod ipse ROBERTUS ad partes externas prædictas ad præfatum PETRUM WARBECK, &c. transfretaret, et in ipsius PETRI adventum ad guerram levandum expectaret; et ipsum PETRUM in regnum ANGLIÆ cum toto posse suo introduceret, ipsum in regem erigeret, &c. Et ulterius dictus WILLIELMUS STANLEY præfato ROBERTO CLIFFORD proditoriè promisit, &c. ad quodcunque et quotiescunque ipse ROBERTUS CLIFFORD aliquos ad domum WILLIELMI STANLEY à partibus exterioribus, per privatum signum inter ipsos habitum, destinaret, pro ipsius ac dicti PETRI WARBECK, inimicorum regis, &c. adjuvamine; ipse WILLIELMUS STANLEY eo toto posse adjuvare vellet, &c. quorum, &c. prætextu dictus ROBERTUS CLIFFORD iter suum ad partes externas, præfato PETRO WARBECK arripuit, &c. Et sic fuerunt adhaerentes, &c.—JUDGMENT, to be hanged, drawn, and quartered.

## CASE 17.

## March and Carew's Case.

SURREY.

Anno tricesimo Henrici Octavi.

Indictment for  
saying, "I like  
" not the pro-  
" ceedings of  
" the realm."

**H**ENRICUS MARCHIO, Exon, proditoriè dicebat, "I like well of the proceedings of CARDINAL POOL:" et ulterius, "But I like not the proceedings of this realm;" and "I trust to see a change of the world:" et ulterius, "I trust once to have a fair day upon those knaves which rule about the king:" et ulterius, "I trust to give them a buffet one day." Et quod NICHOLAUS CAREW, miles, malitiosè et proditoriè murmuravit, et indignatus fuit.

*fuit, et dicebat hæc verba* ANGLIGANA, "I marvel greatly that the indictment against the lord marquis was so secretly handled, and to what purpose? for the like was never seen."—*Per bagam sessionis tent. coram THOM. AUDLEY, cancellar. et alios, 39. Hen. 8.* MARCH and CAREW'S CASE.

The Case of John Rugg.

CASE 18.

BERKSHIRE.

In the thirty-first Year of Henry 8.

JOHN RUGG, *chivalier*, for these words, "The king's highness cannot be supreme head of the church of England by God's law." HUGO, abbot of Reading, *superinde dixit*, "What did you for saving your conscience when you were sworn to take the king for supreme head?" *Et superinde prædictus* JOH. RUGG *dixit*, "I added this condition in my mind, to take him for supreme head in temporal things, but not in spiritual things."—*Per indictment. Mich. 31. Hen. 8.* Indictment for denying the king's supremacy.

The Case of Robert Rumwick.

CASE 19.

KENT.

In the thirty-first Year of Henry 8.

ROBERTUS RUMWICK *indictatur, Quod cum diversi fuerunt comedentes et compotantes, &c. THOMAS BROOK, tenens quandam cephum cervisæ impletum, &c. dixit*, "God save the king! here is good ale." *Ad quod prædictus ROBERTUS dixit proditoriè, &c. desiderans mortem regis, &c. "God save the cup of good ale! for KING HENRY shall be hanged when twenty others shall be saved." Cui prædictus THOMAS dixit*, "Knowest thou what thou sayest?" *Prædictus ROBERTUS iterum dixit ut supra, "God, &c."* Indictment for saying the king shall be hanged.

The Case of Lionel Haughton.

CASE 20.

LEICESTER.

Anno tricesimo tertio Henrici Octavi.

LIONELLUS HAUGHTON, *nuper de ORMESKIRK, in comitat. LANCASTRIÆ, taylor, pro verbis, viz. being shooting at the butts, said*, "I would the king's body had been there as the arrow did light;" AND, "By the mass I would it had been in his body."—*Per indictment. Mich. 33. H. 8.* Haughton's Case.

The Case of Edward Peacham.

CASE 21.

EDWARD PEACHAM was indicted of treason for divers treasonable passages in a sermon which was never preached, or intended to be preached, but only set down in writing, and found in his study: he was tried and found guilty, but not executed.—NOTE, That many of the judges were of opinion, that it was not treason. Peacham's Case. See Foster's Crown Law, p. 199, 200. and 1. Hawk. ch. 17. s. 32. Carth. 405. 4. Bl. Com. 80.

Challercomb's Case.

CASE 22.

HENRY CHALLERCOMB was also indicted of treason for words, and was found guilty, and executed. Challercomb's Case. Vide post 332.

The



## CASE 23.

## The Case of John Williams.

Williams's Case.

3. Inst. 14.

2. Roll. Rep. 89.

1. Hale, 118, 119.

**JOHN WILLIAMS** was also indicted, found guilty, and executed; for writing a treasonable book, called **BALAAM'S ASS.**

**UPON** consideration of all which precedents, and of the statutes of treason, it was resolved by **ALL THE JUDGES** before-named; and so certified to his majesty, that the speaking of the words before-mentioned, though they were as wicked as might be, were not treason.

Treason must be by some particular statute; and an indictment must charge the offence in the very words of the statute.

3. Inst. 5. 22.

1. Mar. cap. 1.

4. Bl. Com. 80.

**FOR THEY RESOLVED**, that unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute 25. *Edw. 3. c. 2.* for imagining the death of the king, &c. and the indictment must be framed upon one of the points in that statute: and the words spoken here can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.

To charge the king with a personal vice, as to say of him, "That he is the greatest whoremonger or drunkard in the kingdom;" is no treason; as **YELVERTON** said it was held by the Judges, upon debate of *Peacham's Case*.

# Michaelmas Term,

4. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

} *Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

## Memorandum.

CASE 2.

IN this vacation, viz. upon the eleventh day of September, anno domini 1628, SIR JOHN DODERIDGE, one of the justices of the king's bench, died at his house in *Egham*, in the county of *Surrey*; a man of great knowledge, as well in the common law as in other humane sciences, and divinity.

The death of DODERIDGE, and the translation of CROKE from the common pleas to the

king's bench. Añte, 4. Co. Pref. 41

After whose death, because there were five judges in the common pleas, whereof myself was the fourth, whereas usually there were but four in the said court, and as many in the king's bench, the king, intending to reduce those courts to their usual course; upon the three-and-twentieth day of the said September (having had communication with COVENTRY, Lord Keeper of the great seal); nominated me to be one of the justices of the king's bench, and signed a warrant the same day for my patent to be justice there; and another warrant reciting my first patent of justice of the common pleas, and determining his pleasure concerning that place (saying all wages and sums, &c.) And the patent of justice of the king's bench was sealed upon the ninth day of October, and bare date the same day; and the patent of revocation of my place of justice of the common pleas was sealed upon the tenth day of October, and both patents were delivered to me upon the eleventh day of that month, at such time as I was sworn justice of the king's bench.

If a justice of the common pleas be made a justice of the king's bench, the office of justice of the common pleas becomes void on signing the patent of promotion, without any patent of revocation. Post. 600. Jones, 192. 1. Hen 7. pl. 10. 4 Inst. 100. 310. Dyer, 159. 197. 332. in marg. 1. Sid. 305.

And a question was then moved about my antiquity, I having one justice in the common pleas, viz. JUSTICE YELVERTON, and two of the barons in the exchequer, viz. TREVOR and VERNON, my *puisnes*, and had not a clause of saving superiority, precedency, and antiquity, as was in the second patent of JUSTICE NICHOLS (he being first one of the judges in the common pleas; and having a patent to discharge him from that place, was then made the prince's chancellor, and two days after justice of the king's bench, with an express exception and allowance to be chancellor to the prince, and saving his precedency and seniority). But ALL THE JUSTICES, assembled at the Lord Keeper's house, agreed, that I needed not such a saving; for my patent continued until the time I was judge of the king's bench; and I never ceased to be a judge, but was translated only: and the justices conceived the patent of revocation of my justice place in the common pleas was needless, because,

A judge who is translated from one court to another, without being discharged from his former office, does not lose his seniority, although there is no saving clause in the patent. Dyer, 255.

by

## MEMORANDUM.

by making me justice in the king's bench, my former patent was in law determined (a), according to the case *Dyer*, 159; yet, for better security, there was one made according to the precedent of JUSTICE JONES's patent, when he was removed out of the common pleas to be judge in the king's bench.

(a) By the grant of an office to one who holds an office incompatible with it, the first office is void. 4. Inst. 100. 310. *Vide post*. 138. 600. 1. Sid. 338. 1. Hen. 7. pl. 10. Cro. Eliz. 76. and see the case of *Milward v. Thatcher*, 2. Term Dyer, 197. 1. Sid. 305. Jones, 295. Rep. 81.

## CASE 2.

## Cusack's Case.

How a prisoner in the custody of the marshal of K. B. on an execution out of sheriff's court, shall be discharged.

CUSACK was condemned in the sheriff's court in London for debt, and taken in execution: afterwards, by a *habeas corpus*, upon suit in the king's bench, the said execution with other causes were returned; whereupon he was committed to the marshal in execution for that debt, and other his executions in the king's bench. And now all the executions in the king's bench were discharged; and the judgment in London reversed, by a writ of error in THE HUSTINGS.

The question was, How he should be discharged of this execution? for this Court hath no record of the execution, but by the return of the *habeas corpus*: and of the reversal of that judgment they have not any record, but what is only surmised; and they may not award a *certiorari* to London, for they there will not return it (a).

(a) *Sed vide* Raym. 74. 3. Mod. 230. 6. Mod. 246. Hard. 402. 1. Keb. 252. 1. Sid. 155. 230. 3. Burr. 316.

WHEREUPON it was advised, that all matters here concerning that execution being discharged, he might be remitted to London for that cause, and there be discharged. *Vide* 29. Edw. 3. pl. 47. 48. Edw. 3. pl. 22. 39. Hen. 6. pl. 44. & 45. *Dyer*, 152. 187.

1. Bl. Rep. 230. 4. Com. Dig. 197. 2. Hawk. P. C. 407.

## CASE 3.

## Geery against Reason.

The words, "PROVIDED, and it is agreed, &c." make a condition, and not a covenant.

1. Roll. Abr. 410. 518. Co. Lit. 203. b. Cro. Eliz. 242. 385. 30. Co. 42. 2. Co. 71. *Dyer*, 311. 1. Vent. 200. 2. Com. Dig. 438. Stra. 569. Cowp. 600. Dougl. 27. 766.

COVENANT. The plaintiff declares, That by articles indentured, shewn, &c. in anno domini 1624, he demised to the defendant certain rooms in Bear-Alley until Midsummer 1626, rendering the sum of 6l. 13s. 4d. rent, "PROVIDED, and upon condition, that the said Reason shall gather the rents of other the plaintiff's tenements in Bear-Alley, reserved quarterly and mentioned in a schedule, and pay the same within twenty days after every quarter-day: and it is agreed, that the said Reason shall retain the rest of the benefit to be made of the said rooms, over and above the said six pounds thirteen shillings and fourpence *per annum*, for his pains in gathering up the said rents:" and shews, that the rents were mentioned in the schedule, and amounted to 190l. *per annum*; and that the defendant had not paid the said rents: but he did not shew that the defendant had gathered them.

The defendant thereupon demurred: for it seemeth that here is not any covenant to gather or pay the rents, but a forfeiture of his lease if he do not gather, and pay them being gathered; and if he doth not pay them, being gathered, an account lies.



GERMINE, for the plaintiff, insisted much, that these words, *Provided, &c.* in the indenture shall make a covenant.

But ALL THE JUSTICES conceived it is not a covenant, but merely a condition annexed to the estate, which determines it by not collecting and paying the rent; and it is not to be intended that it should be a covenant to enforce him to gather and pay them where peradventure he cannot collect them: and thereupon, without argument, it was adjudged for the defendant.

GREEN  
against  
REASON.

### Chamberlaine against Turner.

CASE 4.

**EJECTMENT** for an house called THE WHITE SWAN, in Old-street, in London.

A special verdict was found, That *Henry Metcalf* was seised in fee of the said house, and of a garden thereto appertaining, and held it in socage, and made his will in this manner, which is found *verbatim*: "I devise all my fee-simple lands, goods, and tenements, to *Henry Metcalf*, my son, and the heirs males of his body, and for default of such issue, remainder to his right heirs." and made him executor, and appointed that he should pay his debts out of his goods and lands. And "I devise the house or tenement wherein *William Nicholls* dwelleth, called THE WHITE SWAN, in Old-street, to *Henry Gallant*, my daughter's son, for ever." And the jury found, that the said *William Nicholls*, at the time of the said will making, and of the testator's death, inhabited and occupied the entry or alley of the said house, and three upper rooms therein; and that divers other persons at the same time held and occupied the garden and other places in the said house; and that *William Heylock* and his wife held another room; and that *Henry Gallant*, claiming that house, entered, and made a lease thereof to the plaintiff; and the defendant, by the command of the said *Metcalf*, heir of the deviser, ousted him. *Et si super totam materiam, &c.*

A devise of a particular house for ever passes a fee simple by force of the words of perpetuity, notwithstanding the testator had before devised all his fee-simple lands and tenements.

Post. 200.  
S. C. Jones, 195.  
Co. Lit. 9.  
Cro. Eliz. 330.  
Cro. Jac. 21.  
2. Burr. 1093.  
Cowp. 43. 235.  
306. 660.  
Douglass. 266. 763.  
1. Term Rep. 411.  
2. Term Rep. 656.

This case being argued at the bar by BANES and CALTHROP for the defendant, and by ANDREWS for the plaintiff, two questions were moved: FIRST, Whether the heir of *Gallant* had any more than an estate for life by this devise? because all his fee-simple lands being before devised to his son and heirs males, he afterwards devised that house to *Henry Gallant* for ever; and if it be but an estate for life extracted out of the first estate, then it is determined: and he relied upon *Alice Lundham's Case*, *Dyer*, 357.

But ALL THE COURT resolved, that it is a fee-simple, because of the words "in perpetuum," or "for ever;" and it is not like the Case of *Alice Lundham*, where an express fee was given to one, and after his death devised to another for life.

THE SECOND QUESTION was, Whether all the house passed, or the entry and those three rooms which were in the possession of the said *William Nicholls* only?

HYDE, Chief Justice, doubted thereof; for it may be intended that he did not devise more than *Nicholls* occupied. But JONES,

If a man devise all his messuage in which such a person dwells, called "The White Swan," the whole messuage passes, though that person had only three rooms; for the name of *The Swan* ascertains the whole.—Post. 447. 473. Salk. 234. 2. Bac. Abr. 35. Jones, 379. 1. Roll. Abr. 613. Cro. Eliz. 113. 474. 4. Mod. 132. 1. And. 183. 2. Term Rep. 498. 502.

WHITLOCK,

CHAMBER-  
LAINE  
against  
TURNER.

Cro. Jac. 649.  
1. Vezey, 437.  
3. Com. Dig. 22.  
Salk. 234.  
Gilb. Dev. 24.  
Doug. 762.

WHITLOCK, and MYSELF, were of opinion, that all the house passed to the devisee; for the devise being "that house or tenement," and the conclusion "called THE WHITE SWAN," doth both of them necessarily import the whole house; for the sign of THE WHITE SWAN cannot be intended to refer to three rooms; and the words after, viz. "wherein William Nicholls dwelleth," doth not abridge or alter that devise; and the house being named by the particular name of THE WHITE SWAN, although William Nicholls never inhabited therein, yet it passeth by the devise, and is good, because he inhabited therein, although he occupied but three rooms of it; but if the house had not been named by the particular name of THE WHITE SWAN, and he had devised "THE HOUSE in the occupation of William Nicholls," there peradventure it should not extend to more than what was in the occupation of William Nicholls, and not to that which was in the occupation of others; according to the Case of Andrew Ognell (a), and the Case of Hunt v. Singleton (b), where a lease was made to one Cales of an house, and he let out of that two chambers, and after surrenders the lease, and a new lease was made to the said Cales of the house in his occupation, it was adjudged only of the house in his occupation, and not of the two chambers, for there was a good lease of the house, although the two chambers were not devised: but the devise being "of the house called THE WHITE SWAN, wherein Nicholls inhabiteth," cannot be intended that the devise shall be of the three chambers only, because it cannot be termed the house called THE WHITE SWAN.

On a special  
verdict finding  
a devise of "all  
my fee simple  
to A. and of  
my house  
called the  
White Swan  
to B. for  
ever," it shall  
be intended that  
the testator had  
other lands than  
those belonging  
to the White Swan  
to satisfy the first  
devise — Moor, 268.  
2. Roll. Abr. 698. 702. Cro. Jac. 64. Cro. Eliz. 438. Eq. Caf. 256. 1. Salk. 249. Jones, 393.  
3. Bac. Ab. 299.

THE THIRD QUESTION. And whereas it was objected, That it is not found that Henry Metcalf had other lands in fee-simple to supply the first devise, and therefore necessarily it ought to be extended to the residue of that house, and then it passeth not all: THE JUSTICES answered thereunto, that it ought to be intended, although it be not expressed, that he had other lands, and the doubt of the jury was, Whether the intire house passed by those words? So if they be satisfied, the Court shall not doubt of more than what the jury have found.—*Et adjournatur*; and afterwards it was adjudged accordingly.

(a) 4. Co. 48. 50.

(b) Cro. Eliz. 473. 564. 3. Co. 60. 2.

#### CASE 5.

#### Inkerfalls against Samms.

In *assumpsit* the day upon which the promise is laid in the declaration is not material; and if the jury find a general verdict according to the issue, and a special matter against it, the special matter is void.—Ante, 76. Post. 174. 212. Jones, 192. Cro. Jac. 55. Cro. Eliz. 481. Leon. 80. Hob. 53. Stra. 806. 5. Com. Dig. 168. 171. Cowp. 826. Doug. 683. 1. Term Rep. 141.

**A**SSUMPSIT against the defendant as executor. Whereas the testator in his life, viz. upon the 16. October, 18. Jac. 1. in consideration of five pounds lent unto him, promised to pay, &c. the defendant pleads, that the testator *non assumpsit*. The jury find, that the testator *assumpsit modo et formâ*, but that the testator died such a day, viz. in 17. Jac. 1. so that he was dead a year and more before the time which is alledged in the record.—And the first argument THE COURT held for the plaintiff, that the verdict being that the testator *assumpsit modo et formâ*, the finding over

that

that the testator died before the time mentioned in the declaration is idle, superfluous, and not material; nor is the day of the *assumpsit* material; and although he were dead before the day mentioned in the declaration, it is good enough. And thereupon it was adjudged for the plaintiff, *Vide 23. Eliz. Dyer, 372. 2. Co. 4. Goddard's Case,*

INHERSALLY  
against  
SAMMS.

## Halloway's Case.

CASE 6.

**H**ALLOWAY was indicted and arraigned at *Newgate* for murdering one *Payne*. The indictment was, That he, *ex malitia sua præcogitata*, tied the said *Payne* at a horse's tail, and struck him two strokes with a cudgel being tied to the said horse, whereupon the horse ran away with him, and drew him upon the ground three furlongs, and thereby brake his shoulder, whereof he instantly died, and so murdered him.

Upon this indictment he being arraigned pleaded not guilty; and thereupon a special verdict found, That the earl of *Denbigh* was possessed of a park called *Austerly Park*, and that the said *Halloway* was woodward of his woods in the said park; and that the said *Payne*, with others unknown, entered the said park to cut wood there, and that the said *Payne* climbed up a tree, and with an hatchet cut down some boughs thereof; and that the said *Halloway* came riding into the park, and seeing the said *Payne* on the tree commanded him to descend, and he descending from thence the said *Halloway* struck him two blows upon the back with his cudgel; and the said *Payne* having a rope tied about his middle, and one end of the rope hanging down, the said *Halloway* tied the end of that rope to his horse's tail, and struck the said *Payne* two blows upon his back; whereupon the said *Payne* being tied to the horse's tail, and the horse running away with him, drew him upon the ground three furlongs, and by this means brake his shoulder, whereof he instantly died, and the said *Halloway* left him over the pales into certain bushes. And, Whether upon all this matter found the said *Halloway* be guilty of the murder, *prout?* they pray the discretion of the Court; and if the Court shall adjudge him guilty of the murder, they find him guilty of the murder; if otherwise, they find him guilty of manslaughter.

This special verdict was removed by *certiorari* into the king's bench, and depended three Terms; and the opinion of all THE JUDGES AND BARONS was demanded, and they all (except *HUTTON*, who doubted thereof) held clearly that it was murder: for when the boy, who was cutting on the tree, came down from thence upon his command, and made no resistance, and he then struck him two blows, and tied him to the horse's tail, and then struck him again, whereupon the horse ran away, and he by that means was slain, the law implies malice; and it shall be said in law to be premeditated malice, he doing it to one who made no resistance. And so this Term all the Justices delivered the reason of their opinions: whereupon judgment was given, and he was adjudged to be hanged, and was hanged accordingly.

A boy trespassed into a park with intent to steal wood, but, on perceiving the park-keeper, climbed up a tree to hide himself: on his coming down, the parker struck him twice with a cudgel, and then bound him to his horse's tail, and dragged him till his shoulder was broke, whereof he died; this was adjudged MURDER; for the correction was excessive, and an act of deliberate cruelty.

W. Jones, 198.  
Kely. 127.  
Crompt. 136.  
Dalton, 245.  
J. Hale, P. C. 454.  
Palm. 545.  
Foster, 292.  
J. Hawk, P. C. 126.  
3 Bac. Abr. 668.  
Cowp. 830.



## CASE 7.

## Juxon against Thornhill.

Trinity Term, 4. Car. 1. Roll 76.

A person may, by the king's licence, raise locks upon a publick navigable river flowing through his own land, for the advantage of the navigation; and the owners of barges passing through them may be obliged to pay such toll as the privy council shall afterwards appoint.  
 Post 184. 185.  
 1. Roll. Abr 464.  
 Carth. 191.  
 Cowp. 47.  
 3. Term Rep. 253.

**ASSUMPSIT.** Whereas the plaintiff, by the king's licence, had erected in *Godmanchester*, and in five other places in his own land, six several sluices or locks upon the *river Ouse*, for the better raising and heightening the water in the river, for the easier passage of boats through the said locks; and the king had granted to him to take such reasonable sums for the passage through the said locks as should be agreed upon betwixt him and those who should have such passage: and for that there was contention betwixt him and the defendant and divers others what sums should be paid for such passage, a petition was thereupon presented to the lords of the council, and by them referred to **THE EARL OF MANCHESTER, Lord President**, to set down what rates those which passed through the said locks should pay: that the defendant, in consideration the plaintiff would permit him to pass through the said locks, upon the 20 Oct. 3. Car. 1. promised to the plaintiff, that he would pay him such sums as the said lord president should appoint: and alledgeth in fact, that between the said 20th of *October* and the 23d of *April* following he passed through the said locks with his boats, and carried 2120 tons of coal: and that upon the 24th of *April* the said earl of *Manchester* set down and ordered, that two-pence halfpenny should be paid for every ton which passed through the said locks, in every lock two-pence halfpenny; and that for the said 2120 tons, according to the said rate, the defendant ought to pay him eleven pounds: and that upon the 29th of *April* then next following he requested the defendant to pay the said eleven pounds, and he refused to pay it, whereupon he brought this action.

The defendant pleaded *non assumpsit*; and it was found against him; and now moved in arrest of judgment.

**FIRST**, That it is no good consideration; because the *river Ouse* is a common river, and it is not lawful for any to make stops upon the river, or to take sums of money for the passage through the locks.—*Sed non allocatur*; for the locks are upon the plaintiff's own land, and at his cost, for the exaltation of the water, and making the river navigable for vessels of burthen; and it stands with good reason that they should pay for their passage according to their agreement.

**SECONDLY**, Because it is not shewn that the defendant had any notice given him of the earl of *Manchester*'s order.—*Sed non allocatur*; because he ought to pay as much as he should appoint, and the defendant is to take notice of his order as well as the plaintiff, he being a stranger to both; as where one is obliged to perform an arbitrament, there needs not any notice to be given unto him, but he ought to take notice at his peril. Also the plaintiff alledgeth, that he required the sum according to the order, which is an implied notice. Whereupon rule was given, that judgment should be for the plaintiff, unless farther matter should be shewn to the contrary by such a day.

Ante, 95. Post.

392. 577. S. C. 1. Roll. Abr. 464. Cro. Jac. 288. 492. 5. Co. 113. 6. Mod. 87. 1. Vent. 204.  
 2. Lev. 22. 2. Bulst. 144. Kyd on Awards, 73.

## Chambers's Case.

Case 3.

**C**HAMBERS being in prison in the *marshalsea del hostel de roy*, de- A prisoner committed to the king's bench prison, and brought up by *hab. cor.* may be remanded and brought up again without a new *hab. cor.* by RULE or ORDER of the Court; and if the commitment be by the privy council "for words" spoken at their board, without specifying what the words were, he shall be bailed. Post. 507. 579. 593.

And he was, by rule of the Court, appointed to bring his prisoner then, without a new *habeas corpus*; and the prisoner was advised, that in the mean time he should submit to the lords, and petition them for his enlargement. Upon the said 21st of *October* the marshal had his prisoner there; but because the great Case of *Sir William Withipole (a)* was to be debated that day, and time would not permit to treat of this matter, the marshal was commanded to bring again his prisoner, and have him in court the 23d day of *October*.

GERMINE, for the prisoner, then moved, that forasmuch as it appeared by the return, that he was not committed for *treason* or *felony*, nor doth it appear what the words were, whereto he might give answer, he therefore prayed he might be dismissed or bailed.

BUT THE KING'S ATTORNEY moved, that he might have day until the 25th of *October* to consider of the return, and be informed of the words, and that in the interim the prisoner might attend the council-table and petition.

But the prisoner affirmed, that he oftentimes had assayed by petition, and could not prevail, although he had not done it since the beginning of *October*; and he prayed the justice of the law and the inheritance of a subject.

Whereupon, at his importunity, THE COURT commanded him to be bailed; and he was bound in a recognizance of four hundred pounds, and four good merchants his sureties were bound in recognizances of one hundred pounds a-piece, that he should appear here in *Craftino Animarum*, and in the interim should be of good behaviour; and advertised him, that they might for contemptuous words cause an indictment or information in this Court to be drawn against him, if they would (b).

(a) See post. 134. 147.

(b) Vide post. 168.

## CASE 9.

## Sir William Withipole's Case.

A person arraigned for murder may plead the 11. Hen. 4. c. 9. in avoidance of the coroner's inquisition or the indictment; and then plead over to the felony.—

Persons outlawed in personal actions cannot be jurors.

Post. 147. 365.

Ley, 81.

Jones, 198.

3 Inst. 34.

Sum. 202.

Bro Ind. 2.

11 Hen. 4. 41.

S. P. C. 88.

2 Hale, 60. 155.

2 Hawk. P. C.

c. 25. f. 24. to

32.

3. Bac. Abr.

233. 254.

**SIR WILLIAM WITHIPOLE**, being indicted before the coroners for the murder of *Madyson*, and being arraigned upon that inquest, informed the Court, that he had matter in law to plead to avoid the indictment, and that he ought not to be put to answer; and prayed that counsel might be assigned him.

**MR. NOY** and others were assigned; who, at another day, put in a plea for him, that he ought not to be impeached upon this indictment; for he shewed in his plea the statute of 11. Hen. 4. c. 9. "That none shall be put upon any pannel of inquest at the denomination of any person, unless by the bailiffs and ministers of the sherriffs sworn and known; and that the said jurors should be *probi et legales homines*:" and further pleads, that *Alston*, the foreman of the jury, nominated himself to be of the jury, and fourteen others (shewing their names); and one *Alexander Farrington* required him to return them, he not being sheriff, nor bailiff of the franchise, nor any minister of any sheriff, nor bailiff of any franchise, who ought by the law to return them; and by the said jury the said inquisition was found. And he further pleaded, that two of the said jurors were outlawed in actions of debt, the one in the twelfth year of **KING JAMES**, the other in the first of **KING CHARLES**, and produced the records, being sent by *mittimus* out of the chancery; and averred that the outlawries are yet in force, not reversed nor vacated.

And upon this plea pleaded the Court would advise, Whether it should be accepted? and, What should be done thereupon, either demur or join issue?

**THE FIRST QUESTION** was, Whether the 11. Hen. 4. c. 9. extends to inquests before coroners, or only to indictments before justices of the peace and of *oyer and terminer*?

**SECONDLY**, Admitting that this statute extends thereunto, Whether it extends to persons outlawed in personal actions, or only to persons outlawed for *felony* or *treason* (a)?

(a) Post 147.

Co. Lit. 158.

307. 312. 387.

21. Hen. 6. pl 30. 11. Hen. 4. pl. 41. 2. Roll. Abr. 657. 3. Inst. 32. 2. Hawk. P. C.

And because this was the first plea that had been upon that statute, and would be a precedent in crown matters, the Court would advise. And all the justices of both benches, and barons of the exchequer, met thereupon at *Serjeants-Inn* in *Fleet-street*; and having had conference of those points, the greater part of the said **JUSTICES AND BARONS** were of opinion,

**FIRST**, That the 11. Hen. 4. c. 9. extends to all inquests before the coroners, as to indictments before justices of peace.

**SECONDLY**, That it extends to persons outlawed in personal actions, because an outlawed person is not accounted *probus et legalis homo* to be sworn in an inquest, and may be challenged for that cause. *Vide* 34. Edu. 1. "Proces" 208. 21. Hen. 6. pl. 30.

But



But divers others of THE JUSTICES AND BARONS were of the contrary opinion (a).

FIRST, Because the 11. Hen. 4. c. 9. begins with inquests before the justices, and so the act seems to extend to them; and the statute mentions denomination to the sheriff or bailiff of the franchise; and the inquisition before the coroners is to be of persons within the four next adjacent villages, to be made by the bailiffs or constables of those villages, as appeareth by the 4. Edw. 1. ft. 2. *de officio coronatoris*, and Crompton, folio 113. that no challenge shall be to any of the inquest before the coroners (b).

(a) Jones, 199. says, that three only were of a contrary opinion.

raigned on the indictment on the first day of Hilary Term.

(b) He was arraigned. Post. 147.

### William Viscount Say and Seal against Stephens.

CASE 10.

Trinity Term, 4. Car. 1. Roll 602.

**A**CTION OF SCANDALUM MAGNATUM. The plaintiff declares by the name of WILLIAM Viscount SAY AND SEAL, *unus procerum et magnatum hujus regni ANGLIÆ, tam pro domine rege quàm pro seipso, queritur of the defendant in custodia mareschalli pro eo*, Whereas by the statute 2. Rich. 2. c. 5. confirmed by statute 12. Rich. 2. c. 11. it was ordained, &c. reciting the statute; the defendant, not regarding or respecting the statute aforesaid, on the first day of February, in the third year of Car. 1. at the parish of Bow, in the ward of Cheap, London, having communication with Alice Gilbert, a servant of the said WILLIAM Viscount SAY AND SEAL, of him the said Viscount, in the presence and hearing of divers of the king's subjects then and there being, *hæc falsa et scandalosa verba de eodem vicecomite SAY AND SEAL dixit et publicavit, viz. "Thy lord," dictum comitem INNUENDO, "is a traitor, and I will prove him," prædictum comitem INNUENDO, "a traitor."*

The defendant pleaded *not guilty*; and it was found against him, and damages assessed to two thousand pounds.

CRAWLEY, Serjeant, and MR. CALTHROP, now moved in arrest of judgment, FIRST, That this statute is mis-recited; and then he, founding his suit for himself and the king, and there being no such statute, hath failed. In proof thereof they relied upon the Case of Lord Cromwell (a), where an action was brought upon this statute and mis-recited, viz. "*nuncia*" for "*mendacia*"; there the plaintiff might not have judgment: and Partridge v. Strange (b), where an action was founded upon the 32. Hen. 8. c. 9. of maintenance, and the date of the statute was mistaken, and there the plaintiff might not have judgment; for the Court would not intend any other statute than that whereupon he counts and hath mistaken, and being upon that the Court will not adjudge for him. And in the present Case he recites the statute to be, "that none shall report or publish *de magnatibus aliqua nova mendacia, seu alias res, unde discordia aut aliqua lis (ANGLICE debates) inter magnates vel inter magnates et communitatem dicti regni oriri possint*," whereas the statute is, "whereof discord or slander may arise within the said realm;" so as there is a mis-recital and variance betwixt the

In an action of SCAN. MAG. the statute need not be recited at large — "*Debates*," instead of "*Slander*," or "*discordia inter magnates et communitatem*," instead of "*discordia hoc regnum*," are not material variances; but if the statute be mis-recited in a substantial part, it is fatal. Post. 232.

Ley, 82.  
Jones, 194.  
Cro. Eliz. 906.  
1. Roll. Rep. 78.  
Palmer, 565  
Buller's N. P. 4.  
4. Co. 12. b.  
2. Inst. 25.  
4. Inst. 51.  
1. Lev. 277.  
1. Sid. 233.  
434.  
1. Mod. 232.  
2. Mod. 99 150.  
152 159. 66.  
2. Hawk. P. C. 349, 350. 352.

(a) 4. Co. 12.

(b) Plowd. 62.

WILLIAM  
Viscount SAY  
AND SEAL  
against  
STEPHENS.

wards: "*debates*" for "*slander*," which is a variant word; and the words "*within the said realm*" vary from the words "*inter magnates et communitatem hujus regni*."

SECONDLY, Because it is not shewn that he was *unus magnatum* at the time of the speaking of the words, as the precedent is in *Lord Cromwell's Case*; for it may be that he was created *viscount* or *baron* after the speaking of the words, and it shall not be intended that he was a *viscount* before, unless it had been averred that he was then a *viscount*.

But THE COURT resolved in both points for the plaintiff; for they all agreed, if the mis-recital or variance had been in the purview or substantial part of the act, as mis-reciting the time of the making, as in *Partridge's Case*, or in the body of the act, as in *Lord Cromwell's Case*, "*nuncia*" PRO "*mendacia*" which is another word and of another sense, and in the body of the act, such variance had been good cause to stay the judgment: but here, they conceived, there is not any material variance, for the first part of the act is "*debate vel discordia*," and in the last part "*discordia vel dislander*," which in the intention of the makers of the statute be all one; also it is in the PERCLOUSE "*unde discordia, &c.*" which is but the consequence of the words, or the evil effect ensuing thereupon, and false words and lies are principally prohibited in that statute. The second variance is of the same condition, not material in substance; wherefore for such the Court shall not stay judgment.

In *scan. mag.* if the declaration give the plaintiff the addition of *viscount*, it is sufficient to shew, that he was *unus magnatum* when the words were spoken.

FOR THE SECOND EXCEPTION, ALL THE COURT held the declaration to be good enough; for there is sufficient demonstration in the declaration that he was a viscount at the time of the speaking, for he nameth himself *viscount*, and recites the statute, and that the defendant, not regarding the statute, spake those words of the said WILLIAM Viscount SAY and SEAL: and it cannot be spoken against the said WILLIAM Viscount, unless he had been then a viscount; and the law doth not intend that he was a viscount of another realm, for of them our law doth not take any cognizance.

A *viscount* is within the statute, though a dignity created since the statute.  
Co. Lit. 60.

IT WAS OBJECTED, That there were not any *viscounts* in king Richard the second's time, so that the statute cannot extend to them. But it was answered, True it is, there were not then any viscounts; for in the eighteenth year of king Henry the sixth was the first viscount, and in the one-and-twentieth year of the said king was the question for their seats in parliament; yet the statute is, "*de MAGNATIBUS regni ANGLIÆ*;" and every viscount is a baron, which is an addition of honour.

In an action of *scan. mag.* if the speaking be alledged to have been to the servant of an earl and of an earl, it need not be averred that he was an earl at the time the words were

spoken. By another reason it appears that he was then a viscount, for the speaking is alledged to be to such a servant of the said WILLIAM Viscount SAY and SEAL, and he cannot be servant to a viscount unless he were then a viscount: also the words themselves are, "*Thy lord is a traitor*," which prove that he was a lord at the time of the speaking; and when he names himself *viscount* in so many places, to aver afterwards that he was a *viscount* had been idle and superfluous. But where a justice of peace or other officer brings an action for slanderous words spoken of him in his office

the words were spoken. Jones, 194. 1. Com Dig. 194.

or place, there of necessity he ought to shew that he was then a justice of peace or such an officer wherein he was slandered; yet if he shew that which is *tantamount* it sufficeth, as that he had been a justice of peace for divers years, or for two years, and the speaking is alledged to be within the year, that is sufficient; yet it may be that the commission is renewed, but it shall not be intended. Whereupon judgment was given for the plaintiff (a).

WILLIAM  
Viscount SAY  
AND SEAL  
against  
STEPHENS.

error to the exchequer chamber was brought on the judgment; but it was adjudged that an action of *scian. mag.* is not within the 27. Eliz. c. 5. *Vide post.* p. 142.

(a) A writ of

Baylye against Hughes.

CASE II.

Trinity Term, 4. Car. 1. Roll 738.

**D**EBT for forty shillings and sixpence; and declares, That *Sir Henry Brown* by indenture let to *J. S.* for two hundred years, rendering thirty-one shillings *per annum*, at the *Annunciation* and *St. Michael* by equal portions, and conveys the reversion to him as assignee: and for fifteen shillings sixpence for rent behind for one year ending at the *Annunciation* last past; and for twenty-five shillings for money lent, he brings this action.

The assignee of a term, may take advantage of a covenant against the assignee of the reversion.

S. C. Jones, 242.

3. Lev. 326.

2. Com. Dig.

362.

Co. Lit. 215. 2.

Dougl. 764.

3. Term Rep.

393. 672.

The defendant pleaded as to the twenty-five shillings "*non debet*;" and as to the fifteen shillings sixpence, That the said *Sir Henry Brown* demised the said lands, rendering rent *prout*, and by the same indenture covenants for himself, his heirs and assigns, with the lessee, his executors and assigns, that if he should be disturbed for respite of homage, or be enforced to pay any charge or issues lost, that he shall withhold so much of his rent as he shall be enforced to pay; and shews, that by a writ issuing out of the exchequer for respite of homage and issues lost, so much was levied by the sheriff which he hath withheld of his said rent.

Upon this plea it was demurred in law.

The principal question was, Whether the assignee of a term shall have remedy upon a covenant by way of retainer against the assignee of a reversion?

SECONDLY, Because the defendant doth not shew that the land was held *in capite*, or that homage was due, or the issues duly levied.

WHISTLER, for the defendant, after these matters moved at the bar, argued, that the assignee should have the benefit of this covenant by the common law; and if not, that he was clearly within the 32. Hen. 8. c. 34. And for the other matter the plea is good; for if he be distrained or aggrieved for the homage or issues, he may detain his rent.

But then he took exception to the declaration, for that the plaintiff demanded fifteen shillings sixpence for rent, for a year ending at the *Annunciation*, and the entire rent was one-and-thirty shillings; so that what he demanded was but rent for half a year, and he doth not shew that he was satisfied for the residue, and therefore the declaration ill:—which was held by THE COURT to be an incurable default. Whereupon the record being viewed, and found so, rule was given, that judgment should be,

In debt for 15s. upon a lease rendering 30s. demanding rent for a year, it must be shewn how the ss. are discharged. Post 437.

Ante, 104. 436.—20. Edw. 4. 2. Jones, 242. 2. Vent. 129. 1. Lut. 535. 2. Lev. 4. Co. 24. Hutt. 96. 5. Com. Dig. 58. 242. (2. W. 7) 246. 3. Term Rep. 66.

for



BAYLYE  
against  
HUGHES.

Post. 303.  
Shep. Touch.  
173.  
3. Term Rep.  
393. 678.

for the defendant, that the bill should abate; and no more was spoken at the bar.

But THE COURT conceived, that the assignee of the term should have the benefit of this covenant, for it runs with the land; and at the common law he might have taken advantage to detain the rent reserved upon the lease for years, for it may be appointed to cease at the will of the parties.

## CASE 12.

## Crane against Holland.

Easter Term, 4. Car. 1. Roll 294.

Bailiffs may, by custom, act both in a judicial and in a ministerial capacity in the same court, and in the same cause.

**E**RROR of a judgment in Northampton, Because in Northampton the court being held before the mayor and two bailiffs, the *venire facias* upon the issue was awarded to the two bailiffs to return a jury before the mayor and bailiffs *secundum consuetudinem*; which being returned, and judgment given,

The error assigned was, Because the bailiffs, being judges of the court, could not also be officers to whom process should be directed, there being no custom that can maintain any to be both officer and judge.

But ALL THE COURT (*absente* HYDE) conceived it might be good by custom, and that it was not any error, for the judges are not the bailiffs only, but the mayor and bailiffs; and it is a common course in many of the ancient corporations where the bailiffs are judges, or the mayor and they are judges, yet in respect of executing process they are the officers also; and one may be judge and officer *diversis respectibus*, as in re-disseisin the sheriff is judge and officer. Whereupon the judgment was affirmed.

## CASE 13.

## Skevill against Avery.

To trespass of assault and battery, the defendant may justify that he was possessed of a house, and *manus molliter imposuit* in defence of his possession, without setting out his title specially; for his title or interest is not in issue.

2. Hen. 7. 2.  
1. Jones, 453.  
Co. Lit. 303.  
Yelv. 147.

1. Cro. Jac. 86.  
123. 673.

Salk. 643. 562.  
3. Mod. 132.

**T**RESPASS of assault, battery, and wounding. The defendant pleaded to the wounding, Not guilty. To the assault and battery he pleaded, That he was possessed of a house in such a parish for years, and that the plaintiff entered his house, and would have thrust him out of possession thereof; whereupon he *molliter manus imposuit* to put him out, and the harm, if any done, was in defence of his own possession.

The plaintiff hereupon demurred.

GOLDSMITH, for the plaintiff, shewed for cause, That the defendant had pleaded a lease for years, not shewing who made the lease, nor when it was made, nor for how many years; whereas they ought to have been pleaded specially, and shewn *particulatim*, for if it be traversed, there cannot be any issue thereupon: and he relied upon *Crogat's Case* (a), that "*de injuriâ suâ propriâ* is no plea."

But ALL THE COURT held, that the defendant had well pleaded; for saying that he was possessed for years is but an inducement and conveyance to his justification, and not the substance thereof,

12. Mod. 37. 509. Carth. 10. 445. Comb. 27. 472. 2. Mod. 70.  
3. Mod. 132. 5. Com. Dig. 73. 79. 355. 3. Will. 65. 1. Term Rep. 671. 3. Term Rep. 643.

(a) 8. Co. 66.

which

which is, that he offered to thrust him out of the possession of his house; and whatsoever title he hath, it is not material, for if he were in possession by virtue of a lease at will, or any other title, "*de injuria sua propria*" is a good plea; for the title or interest not coming in question (and what was pleaded or alledged being but an inducement to the plea), it needs not be so certain as where it is pleaded by way of title to make claim in the defendant.

SKREVELL  
against  
AVERY.

Ld. Raym. 132.  
3. Term Rep.  
643.

## Shutford against Penow.

CASE 14.

Trinity Term, 4. Car. 1. Roll 770.

**A**SSUMPSIT. Whereas the defendant had a dog who used to kill sheep, and knowing thereof, and that this dog had killed the plaintiff's sheep, and having notice that the plaintiff intended to sue him for recompence, he thereupon intreated the plaintiff not to sue him, and to make what benefit he could of the sheep so killed; and in consideration that the plaintiff would desist his suit, and make such benefit as he might of the said sheep, the defendant, the first day of May, 18. Jac. 1. promised the plaintiff to recompense him the damages which he sustained by the killing of the said sheep; and alledged in fact, that he thereupon desisted from his intended suit, and that he endeavoured to make what benefit he could of the sheep so killed, but could not make any; and that he was damnified by the killing of them four-and-forty shillings; and that upon the first day of May, 2. Car. 1. he requested the defendant to recompense him for his damages sustained, and the defendant refused; whereupon he brought this action.

Wherea promise is made to do a thing upon request, the cause of action does not arise until the request be made and refused.

Ante, 35. 115.  
Godb. 437.  
Jones, 194.  
Hutton, 107.  
1. Lev. 48.  
Salk 422.  
Skin. 555.  
Strange, 907.

The defendant pleaded the 21. Jac. 1. c. 16. and that this action lies not by the said statute, being grounded upon a promise made above six years since; whereupon the plaintiff demurred.

And after argument at the bar by ROLLS, *for the plaintiff*, and by *for the defendant*, it was adjudged, that the action was well brought within the time limited; for although the promise was made 18. Jac. 1. yet there was not any cause of breach thereof, nor ground of action against the defendant until request to make recompence; for until such request he did not know what to pay, nor was there any due, for the duty ariseth upon the request, and the non-payment after the request is the cause of the action: as *assumpsit* to pay such a sum if he marry *A. S.* or upon such person's return from *Rome* upon request, there is not any thing due, nor is there cause of action, until the marriage or return from *Rome* and the request made; and although the promise was made ten years before, yet the cause of action is the non-payment upon request after marriage or return from *Rome*, and not before; and if the action be brought within the time of the statute after the breach, it is well enough. Whereupon it was adjudged for the plaintiff.

## CASE 15.

## Lewknor against Cruchley and his Wife.

Easter Term, 4. Car. 1.

To charge another with an assault with intent to rob is actionable, although the words import that no felony was in fact committed

S C Jones 195.

1. Roll. Ab. 50.

4. Co. 19. b.

Yelv. 90.

Post. 337.

1. Sid. 231.

373.

Litch. 47.

Palm. 11.

1. Com. Dig.

177.

**A**CTION for words spoken by the wife of *Cruchley*; for that the defendant said of the plaintiff, "*JOHN LEWKNOR*" (*innuendo* do the plaintiff) "*and JOHN SMITH*" (*innuendo* one *John Smith*), "knowing that *J. S.* a goldsmith, did carry with him a great deal of plate, did lay wait to rob him, and set upon him by the highway; but he raising the country, they did fly away, and *LEWKNOR* lost his horse, and they both were driven to ride away upon one horse." Upon not guilty pleaded, the verdict was found for the plaintiff.

*GARDINER* moved in arrest of judgment, that an action lies not for these words, for it appears by his own shewing that there was not any felony committed; and she doth not charge him with felony, but with a misdemeanor (*a*), as it were a riot, and is no more than if she had charged him with committing a riot; and it is but with an intent to do it; and therefore for these words an action lies not. In the case of *Eaton v. Allen* (*b*), for saying, "He is a brabblor and quarreller, for he gave his champion counsel to make a deed of gift of his goods to kill me, and then to fly out of the country, but God preserved me," it was adjudged that the action lies not, for he did not do any act, but it is matter of intent which cannot be known.

But ALL THE COURT delivered their opinions *seriatim*, that the action well lies; for although he chargeth him with an act which is not felony, yet he chargeth him not only with the intention but with a fact which is as near to felony as may be, and is such an offence which is more than intent only and more than riot, and for which fine and imprisonment are due.

*JONES, Justice*, cited one *Wicks's Case*, where the defendant said, "Nine persons set upon me to have robbed me, and you," *innuendo* the plaintiff *Wicks*, "was one of them," and adjudged that the action well lay. Whereupon judgment was given for the plaintiff.

(a) But now by 7. Geo. 1. c. 22. this offence is made felony.

(b) 4 Co. 16.

## CASE 16.

## Law against Harwood.

Michaelmas Term, 3. Car. 1. Roll 336.

In an action for the slander of title, a special damage must be shewn.

Ley, 89.

Jones, 196.

Cro. Jac. 398.

484.

Cro. Eliz. 197.

1. Roll. Rep.

244.

Yelv. 89.

Moor, 127.

1. Sid. 85. 95.

**E**RROR of a judgment in *Windsor*, in an action on the case for slander of title. The plaintiff declares, Whereas he was seised in fee as copyholder of lands in *D.* within the jurisdiction of the defendant's court, that the defendant said, "he had not any title to those lands."

The defendant justifies; and issue being taken thereupon, it was found against the defendant, and damages assessed to ten shillings, and sixpence costs; and the court increased the costs to three pounds, and judgment given accordingly.

THE FIRST ERROR assigned was, That the declaration was not good, because he could not shew that by the occasion of those

Palmer, 530. Raym. 61. 1. Com. Dig. 175. 5. Com. Dig. 534.

words



words he had any prejudice, as that he was bargaining for the inheritance with any, or for a lease, or any other special prejudice.

Law  
against  
HARWOOD.

THE SECOND ERROR was, Because damages being found but at ten shillings, he might not, by the 21. Jac. 1. c. 16. have more costs than damages.

ALL THE COURT agreed as to the first error assigned, that the declaration was not good, and so the judgment was erroneous, because the action is not maintainable without shewing special prejudice, no more than for calling one "whore" or "bastard" without shewing special cause of temporal damages; as in *Anne Davies's Case* (a). And it is not like to words spoken which imply slander and temporal loss, as "thief," and "bankrupt," or such like; but slandering of one's title doth not import in itself loss, without shewing particularly the cause of loss by reason of the speaking the words, as that he could not sell or let the said lands; but being general words they are not sufficient. 1. Co. 177.

TO THE SECOND ERROR assigned, all except HYDE, who seemed to doubt thereof, held, that the action is out of the statute of 21. Jac. 1. c. 16. as well for the time of limitation as for the costs, for that extends to actions for slanderous words which are intended to the persons of men, and are common actions, and rather begin of spleen than otherwise; but not to this action, which is rare, and not brought without special damage. But for the first cause the judgment was reversed. An action for slander of title is not within 21. Jac. 1. c. 16. which gives no more costs than damages if under 40s. Post. 163.

Jones, 196. 1. Salk. 207. 2. Mod. 371. 3. Mod. 311. Stra. 645. 2. Com. Dig. 546. 5. Com. Dig. 533. R. 453. 1. Term Rep. 655. 1. Sid. 95.

(a) 4. Co. 16. See also *James's Case*, 4. Co. 17. and *Oxford v. Cross*, 4. Co. 18.

### Hughs against Farrer.

CASE 17.

ACTION FOR WORDS, viz. "Thou art a witch, and didst bewitch my mother's drink." And being afterwards desired to know, Why she called her witch? she answered, "If I called her witch, we will prove her a witch, and answer what we have done." Upon not guilty pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that for these words an action lies not, because they are general words, and shew not any special hurt to the drink, so not within the statute of 1. Jac. 1. c. 12. (b) if there be no hurt to the persons or goods.—But ALL THE JUSTICES, except WHITLOCK, conceived that the action well lies; and it was adjudged for the plaintiff. Words imputing witchcraft are actionable, although no consequential damage be shewn. Post. 282. 474. 480. 1. Jones, 197. 325. 1. Roll Abr. 45. 1. Com. Dig. 176.

(b) Repealed by 9. Geo. 2. c. 5.

### Lady Cavendish against Middleton.

Trinity Term, 4. Car. 1. Roll 243.

CASE 18.

ACTION UPON THE CASE. Whereas the said lady, by *Ralph Buck*, her servant, having bought of the defendant twelve beasts for fourscore pounds, paying for them twenty pounds in hand, and was to pay sixty pounds residue at the end of the defendant *ex equo et bono* ought to refund.—Jones, 169. 1. Roll Abr. 106. 1. Show. 68. 3. Mod. 261. 1. Term Rep. 370. 1. Vezey, 198. *Moses v. M'Farlan*. 2. Burr. 1005. 4. Burr. 2133. Dougl. 656. 1. Term Rep. 370. An action of *assumpsit* will lie for money paid by mistake, which the de-

month,

LADY CAVEN-  
DISH  
against  
MIDDLETON.

month, which twenty pounds the said *Ralph Buck* immediately paid, and the sixty pounds residue he paid for the plaintiff to the defendant at the end of the month, and after died; that the defendant, after the said *Buck's* death, demanded of the plaintiff again the said sixty pounds, affirming it was not paid unto him: whereupon the plaintiff, *fidem adhibens* to his assertion, paid unto him the said sixty pounds, *ubi reverâ* he had received it before: and upon this deceit the action was brought.

SERJEANT CREW moved in arrest of judgment (after verdict upon not guilty pleaded, and found for the plaintiff), that this action lies not, but she ought to have brought an action of account, as for money unduly received.

(a) Post. 503.  
Cro. Eliz. 644.  
Yelv. 70.  
Moor. 854  
Cro. Jac. 69.

BUT ALL THE COURT conceived, that the action well lies, although the plaintiff might have brought an action of account (a). Whereupon it was adjudged for the plaintiff.

## CASE 19.

## Viscount Say and Seal against Stephens.

*Ante, Page 135.*

A writ of error  
does not lie on

2. Rich. 2. c. 2.  
for an action of  
*scam. mag.*

Post. 163. 286.  
335.

Jones, 195. 423.

3. Cro. 142. 294.

1. Sid. 143.

1. Vent. 49.

1. Ley. 82.

Raym. 275.

Cro. Jac. 171.

Cro. Eliz. 294.

Ld Raym. 954.

5. Com. Dig.

287.

See the Case of

Lloyd v Skutt,

Dougl. 351.

VISCOUNT SAY AND SEAL having had judgment to recover, a writ of error was brought to remove the record into the exchequer chamber, upon the 27. *Eliz. c. 5.* which gives a writ of error upon a judgment given in actions upon the case, debt, detinue, covenant, account, ejectment, or trespass, first commenced there where the king's majesty shall not be a party.

It was moved, that the writ of error is not allowable, because it is given in seven several actions there enumerated, and is not allowable in any other action, as in replevin, *scire facias*, &c.: and although it be here termed an action upon the case, yet it is more than an action upon the case, for it is in a far higher degree, and founded upon the 2. *Rich. 2. c. 5.* and is for the king and party.

And of that opinion were HYDE, *Chief Justice*, JONES, and WHITLOCK, that this action is out of the statute; for the statute is to be intended in actions upon the case, and not in other actions, nor to this action, which is SCANDALUM MAGNATUM, and grounded especially upon the statute, and the 27. *Eliz. c. 5.* being to alter the course of the common law, ought not to be extended to other actions than what are mentioned in the statute: and it was said, that after the said statute no writ of error hath been brought upon such actions; and it is intendable, that if a writ of error might have been brought, it would have been practised before these times. But the other objection, that it was brought by the king and the party was not much regarded, for so are actions upon the case for the king and the party, and debt for not setting out tithes; yet it is a common course upon those actions to have writs of error in the exchequer chamber: and it was said, that if the lords in parliament had intended that this should be examined by a writ of error any where but only in parliament, they peradventure would not have agreed unto it.

But I doubted thereof, and delivered not any opinion; for I conceived it more proper to have it disputed in the exchequer chamber

1 Co. 87. b.  
Co. Lit. 108.

when the writ of error shall be returned, as it hath been in other Post. 300.  
cases where a writ of error hath been brought upon a *scire facias*,  
and been adjudged there that it lies, than for us to dispute it, being  
a matter of our own judging (a).

(a) Ld. Raym.  
954. Post. 286.

## Long against Nethercote.

CASE 20.

Trinity Term, 4. Car. 1. Roll 43.

**E**RROR of a judgment in *Sudbury*, in debt upon a lease for If debt by the  
years by the assignee of a reversion. assignee of a

THE FIRST ERROR assigned was, For that the court is held by reversion do not  
virtue of letters patents of *Queen Mary*, and the process is awarded shew the deed,  
*secundum consuetudinem curiæ*, which cannot be by custom where the and lay the  
court is erected within time of memory. venue where the  
land lies, or if  
an inferior court  
erected within  
memory award  
process *secundum*  
*consuetudinem*  
*curiæ*, it will be  
bad on demur-  
rer.

THE SECOND ERROR assigned was, Because the action of debt is brought supposing a demise in *Sudbury* of lands in *D.* in the county of *Essex*, whereas it ought to be brought in *Essex*, being brought upon the privity of estate, and not upon the contract, the plaintiff be brought where the devise was made, although the land be in another county, and is well enough; but where the action is brought by one as assignee of a reversion, it ought to be brought in the county where the land lies, and not where the demise was made.

THE THIRD ERROR assigned was, Because he claims by grant of a reversion, and doth not shew that it was by deed, and without a deed or fine a reversion cannot pass.

And, for THE FIRST and THE THIRD ERRORS principally, the judgment (not being upon verdict, but upon demurrer) was reversed.

## Darrofe against Newbott.

CASE 21.

**E**RROR of a judgment in *Bridgewater*. The error assigned On demurrer to  
was, For that on an action in the case in an *assumpsit*, the evidence the  
parties being at issue, a demurrer was joined upon the evidence, and jury may assess  
thereupon the jury discharged; and afterwards judgment was given the damages,  
for the plaintiff, and a writ of enquiry of damages awarded, and or they may be  
damages found, and judgment thereupon; where the jurors who ascertained on a  
came to find the issue, although by the demurrer they were dis- writ of enquiry.  
charged of the issue, yet ought to have assessed damages conditionally Ante, 32.  
if judgment should be given for the plaintiff. And in proof thereof Post. 153.  
was cited *Scholastica's Case*, *Plowd.* 408. the *Old Book of Entries*, 146. Co. Lit. 72. a.  
in *December* 12. & 13. *et ibidem* 237. *Forger de Faux Faits*, 11. 5 Co. 104.  
10. Co. 119.

And it was said by THE COURT, If these precedents be good law, then it may be enquired of by the same jury conditionally; but it may as well be enquired of by a writ of enquiry of damages, when the demurrer is determined; and the most usual course is, when there is a demurrer upon evidence, to discharge the jury without more enquiry. *Vide Old Book of Entries*, fol. 551. *Trespas in Arser*, 1. 1. Lev. 87.  
Hardres, 112.  
Ld Raym. 60.  
Salk. 284.  
Bull. N.P. 313.  
Carth. 362.  
4 Bac. Abr. 137.  
2. Com. Dig. 622.  
Douglass, 112. 134. 218. 222. 224. 225.



## CASE 22.

## Sir Humphry Tufton and Sir John Ashley's Case.

If in ingrossing the entry of judgment in *quo warranto* upon a disclaimer the date of the patent be omitted by the negligence of the clerk, it may be amended by the Paper-book, and hearing evidence as to the intention of the parties. Post. 312.

Poph. 180.  
8. Co. 156. b.  
3. Mod. 7. 167.  
8. Mod. 58.  
Stra. 843.  
Ld. Raym. 1518.  
2. Burr. 1098.  
1. Com. Dig. 314.  
1. Bac. Abr. 96.  
Cowp. 407.  
425. 841.  
1. Term Rep. 782.  
2. Term Rep. 707.  
3. Term Rep. 359. 657. 749.

**Q**UO WARRANTO against the corporation of *Maidstone*, for claiming divers liberties in the village and parish of *Maidstone* (in which parish one house called *THE MOTE*, wherein *Sir Humphry Tufton* inhabited, and a great house called *THE ARCHBISHOP'S PALACE*, which was conveyed to *Sir John Ashley*, were situated); and a judgment was entered by disclaimer, with consent of the parties, "*virtute vel prætextu literarum patentium gerent. date anno decimo septimo Jacobi regis.*" But because these words, "*gerent. date anno decimo septimo Jacobi*" were in the margin, and by reason of a stroke made cross the said words the clerk had omitted them in the ingrossing the judgment (which was entered upon record "*anno secundo Caroli regis*"), it was now moved this Term, that those words might be interlined, and the record amended.

But it was much opposed by *HENDEN*, *Serjeant*, and *MR. NOY*, of counsel for *Sir Humphry Tufton* and *Sir John Ashley*, whom the cause concerned; for they said, that albeit it is true that they were omitted by the negligence of the clerk, and the Paper-book was fair, without interlineation or crossing, yet it cannot be amended being in another Term, much more in another year, especially in the king's case; and that none of the statutes of amendments extend to cases of *quo warranto*, or suits where the king is party; and that the amendment will alter the record in substance; for whereas their suit was to be freed from those liberties by *monstrans* of any charters, now by this amendment they will be freed only from liberties claimed by the charter of *decimo septimo Jacobi*, whereas there were other charters pretended, *viz. in anno secundo Elizabethæ*, from which they desired to be freed.

But upon great examination of this omission, and upon certificate of *THE ATTORNEY GENERAL*, that these words omitted, *viz. "gerent. date anno decimo septimo Jacobi,"* were inserted by him with his hand, and written in the margin of the Paper-book in the side of the book, and that it was intended by the parties that this disclaimer should not extend further than to liberties granted by the charter of *decimo septimo Jacobi*, and not to liberties granted by former charters, and that the stroke which was made cross the said lines was uncertain whether voluntarily done or when done, and upon examination of divers witnesses that such was the agreement, it was held by *ALL THE COURT* to be amendable, by the course of the common law, as well in another Term as in the Term when it was entered, and as well in the king's case as of a common person; and being merely a misprision of the clerk, by the misguiding of the Paper-book, by the examination of all the circumstances, it is no more than when a special verdict is mis-entered, which is rectified by the notes of the clerk of the assise. Whereupon it was awarded to be amended, and was amended accordingly.

## Kendal against Fox.

CASE 23.

Trinity Term, 3. Car. 1. Roll 746.

**EJECTMENT.** Upon a special verdict the case was, That *Nicholas Kendal* and *Lowda* his wife being jointly seised by purchase during the coverture for their lives, remainder to *Walter* their eldest son in tail, remainder to *William* their son in tail, remainder to the right heir of *Nicholas*; afterward *Nicholas* by deed, with letter of attorney, enfeoffs the said *William* and his wife, and the heirs of the body of *William*, remainder to the right heirs of the said *Nicholas*, with warranty against all persons; and after levies a fine to two strangers of the same land to them and their heirs, with warranty against all persons; and they render it to him for a week, remainder to the said *William* and his wife, and to the heirs of the body of *William*, remainder to the right heirs of *Nicholas*. Afterward *Nicholas* dies; *Lowda* the wife enters, and dies; *Walter* the eldest son enters; *William* and his wife enters, and lets to the plaintiff.

The first question was, Whether this warranty made by *Nicholas* upon the feoffment, being a collateral warranty, and descending upon *Walter* the eldest son, be totally avoided by the entry of *Lowda*?

And, Whether the remitter of the wife be also remitter to *Walter*, and the warranty discharged?

And IT WAS HELD, that it was not; for the warranty being descended, and attached before the entry of the *feme*, although she be free and not bound by the warranty, yet he in remainder being bound, that estops the remitter. *Vide* 44. Aff. 35. 44. Edw. 3. 30. And upon the first argument by MAYNARD, for the plaintiff, and CALTHROP, for the defendant, it was adjudged for the plaintiff (a).

(a) A writ of error was brought in the Michaelmas Term, 5. Car. 1. and the exchequer chamber on this judgment in judgment affirmed. 2. Roll. Abr. 741.

## Anonymous.

CASE 24.

**ERROR** of a judgment in a *quare impedit* for the church of *Leckhamsted*: and therein the judgment being for the plaintiff, and the value of the church found to be fourscore pounds *per annum*, a writ of error was brought of the judgment before the *exigi facias*, and after the record removed; and the judgment being affirmed, and having depended a year and more, it was moved, that according to the 3. Hen. 7. c. 10. which appoints damages and costs to be allowed where writs of error are brought *pro delatione executionis* (b).—THE COURT here awarded, that the defendant in the writ of error should have damages for a year (during which time the writ of error was depending) according to the value of the church found by the verdict, which was 80l. *per annum*; and they awarded him eighty pounds besides costs, according to the precedent in 6. Edw. 6. *Dyer*; 77.

Strange, 1072. *contra*. See *vide* Strange, 931. 1084. ac. Dougl. 752. in *notis*.

(b) See 13. Car. 2. c. 2. and 8. & 9. Will. 3. c. 11.

## CASE 25.

## Royson's Case.

Persons who  
swear them-  
selves in justifi-  
ing bail before  
a Judge, are li-  
able to the pu-  
nishment of  
wilful and cor-  
rupt perjury;  
and if commit-  
ted or confessed  
in court, may  
be sentenced  
immediately to  
the pillory, &c

1. Styles, 277.

Cro. Jac. 256.

Salk. 84.

Strange, 185.

384. 564.

6. Mod. 73.

4. Bl. Com. 284.

1. Com. Dig. 480.

Tidd's Practice, 140, 141.

1. Hawk. P. C. 322.

2. Hawk. P. C. 214. 219.

**R**OYSON, because he offered himself to be bail in an action before JUSTICE WHITLOCK (and upon his oath affirming himself to be a subsidy-man, and to be assessed four pounds goods in the subsidy-book—being farther examined what he paid, and other questions, and confessing that he was not any subsidy-man), was by him committed, and the next day brought by the marshal into the king's bench; and being examined of this misdemeanor, submitted himself to the grace of the Court, and confessed that he had been bail in other actions, and had sworn that he was a subsidy-man, whereas he now confessed in court that he was not; for this cause he was presently adjudged to be committed to prison, and to stand upon the pillory, with a paper mentioning his cause, viz. "FOR FALSE BAIL," and to be brought to the court of king's bench, common pleas, and exchequer. And this upon his confession was recorded in court, without other proceedings against him.

## CASE 26.

## Green against Guy.

If a statute ap-  
point an offence  
to be determined  
in any of the  
king's courts of  
record, it can  
only be tried in  
Westminster-hall.  
Ante, 112.

Jones, 193.

Cro. Jac. 538.

Cro. Eliz. 737.

Salk. 178. 373.

Carth. 146.

2. Bl. Rep. 906.

1. Com. Dig.

227.

Sed vide

4. Inst. 164.

2. Hawk. P. C.

28.

2. Hale, 29.

3 Term Rep.

362. 442.

**I**NFORMATION for the king and himself before the justices of assise in the county of *Essex*, upon the 21. *Hen. 8. c. 13.* for non-residency for eleven months upon his church of *Little Thurrock*, in the county of *Essex*.

The defendant pleaded the statute of 21. *Hen. 8. c. 13.* that one who hath two benefices shall be resident upon the one, and that he was lawfully presented, instituted, and inducted, as well to the vicarage of *Edgeware*, in the county of *Middlesex*, as to the rectory of *Little Thurrock*, and that he was all the time in the information mentioned resident upon his said vicarage of *Edgeware*.

The plaintiff thereupon demurred.

**HENDEN**, *Serjeant*, alledged the cause of demurrer to be, For that he did not shew a dispensation, as in *Boyton's Case*, cited 4. *Ca. 119.*

But to that point no resolution was given: for in regard this information was brought before the justices of assise and *oyer et terminer*, and the statute doth not give it but only in the king's courts, where there may be *essoign*, *gager de ley*, or protection; therefore notwithstanding the statute of 21. *Jac. 1. c. 4.* which appoints that informations taken by inquests before justices of assise or of *oyer et terminer* shall be determinable there, IT WAS RESOLVED, upon conference with the other Justices, that this information lieth not before them. And judgment was given for the defendant. *Vide Ca. 19 Gregory's Case*, and 6. & 7. *Eliz. Dyer*, 236.



## Hilary Term,

### 4. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt Solicitor General.*

} *Justices.*

### Sir William Withipole's Case.

*Ante, fol. 134.*

#### CASE 1.

THE first day of this Term *William Withipole* was arraigned upon an indictment of murder found in this vacation in *Suffolk* before commissioners of *oyer et terminer*, and certified hither by *certiorari*; and upon his arraignment he desired to have counsel to plead for him *ore tenus*, pretending he had matter in law to plead.—But THE COURT denied it, unless he would shew to them some exception in law, for which they should see cause to appoint him counsel; and when MR. HOLBORN should be assigned for him: and THE COURT said, any other might be, though not assigned.

A prisoner arraigned for murder cannot have counsel assigned to him unless he shew some exception in law, and then he may have counsel without assignment.

Post. 175. 365. R. 9, 10. 2. Hawk. P.C. ch. 39. f. 5.

Afterwards the said MR. HOLBORN, being assigned his counsel, moved, that he ought not to be arraigned upon this indictment, because he had been *autrefois arraign* upon an inquisition of murder found before the coroner, and had pleaded thereto, &c. and so concluded his plea by pleading not guilty to the felony.—But it was held by ALL THE COURT, that this was no cause of plea; for where he is not convicted or acquitted, he may be arraigned upon a new indictment. But to avoid that doubt, that he should not be questioned upon both, it was ruled, that the first should be quashed insufficient.

*Autrefois arraign* on an inquisition is no bar to an arraignment on an indictment for the same offence; for the Court may quash the inquisition.

1. Hawk. P. C. ch. 34. f. 1. 1. Bl. Rep. 461. 2. Hawk. P. C. 523. 534. 4. Co. 45. 3. Foster, 106. 3. Burr. 1468. Dougl. 240.

Then it was moved by HOLBORN, that one of those indictors was outlawed in trespass.—But because he had not the record ready, and the Court conceiving it to be alledged by him in delay of justice only, therefore THE COURT ordered him to answer; and he pleading not guilty, they commanded to have a sufficient jury to try him, returnable *Oclabis Purificationis*.

Q<sup>u</sup>. If outlawry in trespass is any objection to a grand juror. Jones, 198.

Ante, 134. 2. Hale, 155<sup>o</sup>.

2. Hawk. P. C. c. 25. f. 16. c. 39. f. 4.

### Forger against Sales.

#### CASE 2.

DEBT upon an obligation against the defendant for an hundred pounds, as son and heir of *William Sales*; and declares, That *William Sales*, by his obligation here shewn, had obliged himself in an hundred pounds, &c. and omitted these words which were in the obligation, "*Et ad eandem solutionem faciendum obligo me et heredes meos.*" The defendant pleaded *riens per descent*; and it was held against him.

Q<sup>u</sup>. If in debt on bond against an heir with a *profect in curia*, the declaration can be amended in the omission of "*and my heirs,*" by the

Salk. 30. Ld. 1. Will. 30.

Take of the clerk who drew it. 3. Bac. Ab. 693. and the cases there cited. 1. 133, 134. 668. 1. Crompt. Prac. 108. Stra. 954. 1197. 1. Burr. 321. Regl. 361. 1. Term Rep. 782. 3. Term Rep. 349. 657. 749.

He

FORGER  
against  
SALES.]

He now moved in arrest of judgment, that these words being omitted, it doth not appear the heir was bound.

But it was prayed on the other part, that it might be amended, because it was the mere default of the clerk, who having the obligation before him omitted those words; and the clerk, being examined, confessed, that he had the obligation and instructions to draw it against the defendant *as heir*, and that it was a mere misprision of himself.

Ld. Ray. 134.  
Burr. 1257.  
Doug. 647. 718.

JONES, *Justice*, conceived it not amendable, because it is the substance of the declaration; as where one declares in the *debet et detinet*, where it ought to be in the *detinet* only, as 22. *Edw. 4.* 21. it is not amendable.—But MYSELF and WHITLOCK conceived it to be amendable, it being merely the default of the clerk, when he had the obligation before him: and the action is brought against him *as heir*, and so he is termed in the obligation itself, and it is merely the omission of the clerk; which is well amendable.—And HYDE, *Chief Justice*, inclined to this opinion: but to avoid further question, it was appointed to be amended by consent, and that the defendant should plead *de novo*.

CASE 3.

Audley against Halsey.

Hilary Term, 3. Car. 1. Roll 943.

Goods taken upon an extent, three days before a commission of bankrupt issues, cannot be sold by the commissioners, although they are not delivered to the creditor by the sheriff upon a liberate until three days after the issuing the commission.

Post. 166. 176, 177.

S. C. Jones, 202.

2 Hen. 4. pl. 14.

1 Roll. Ab. 893.

Moor, 873.

Cro. Eliz. 174.

181.

8. Co. 171. a.

1. Leon. 144.

2. Show. 480.

Bunb. 202.

Stra. 982. 978.

Bull. N. P. 42.

1. Bl. Rep. 65.

1. Burr. 20.

1. Com Dig.

540.

Balk 108

Cooke's Bank.

TROVER of goods on the 25th Nov. 3. Car. 1. Upon not guilty, a special verdict was found, "That one *John Hill* and *Alice Squire* were possessed of those goods, and used the trade of merchandize; and being so possessed, were bound to the defendant, 21. Jac. 1. in a statute, acknowledged according to the 23. Hen. 8. c. 6. for a true and just debt; and that being forfeited, he sued AN EXTENT upon that statute, 30th October, 3. Car. 1. directed to the sheriffs of London; and that they, by virtue of that EXTENT, on 31st October, 3. Car. 1. extended those goods (the writ being returnable in *Craftino Animarum*), and returned the writ and inquisition into the chancery: that on the 3d November, 3. Car. 1. the said *John Hill* and *Alice Squire* became bankrupts, being indebted to the plaintiff, and to divers others for true and just debts: that upon the 6th November, 3. Car. 1. the defendant sued a LIBERATE upon that extent, and those goods the same day were delivered by the sheriffs according to the appraisement in the extent: that afterward, viz. upon the 8th November, the plaintiff and others sued out the commission of bankrupts against the said *Hill* and *Squire*, and the commissioners, by virtue of their commission, sold those goods to the plaintiff upon the 23d of November, 3. Car. 1.; and that the defendants afterwards, viz. the 25th November the same year, converted them, &c." *Et si super totam &c.* And it was argued several days at the bar.

The sole question was, Whether *John Hill* and *Alice Squire* becoming bankrupts after the extent, and before the liberate, the sale of the commissioners to the plaintiff, after the goods delivered upon the liberate, be good?

3. Com. Dig. 308. 2. Espin Dig. 330. Doug. 395. 2. Term Rep. 123. And see Laws, 2d edit. p. 404. 406.

AUDLEY,  
against  
HALSEY.

NOY and FARRER, for the plaintiff, argued, that this sale is good; for notwithstanding this *extent*, the property of the goods remain in the conufors, and by the *extent* are only seized into the king's hands, but that shall not divest any property from the conufors; for they are but as it were in protection of the king; and then, when the conufors become bankrupts before the *liberate*, those goods are in the power of the commissioners to sell and distribute amongst the creditors. And they relied especially upon the case of *Dyer*, 67. where goods being extended, yet were subject to be seized for the king's debt; and they also relied upon the 13. *Eliz.* c. 7, and chiefly upon the 21. *Jac.* 1. c. 15. whereby it is proved, that the commissioners may sell goods or lands, notwithstanding judgments, statutes, executions, or extents, not served or executed; and that they said was not done until the *liberate*, otherwise there would be a mischief; for then there may be an *extent*, and no *liberate* be sued after upon it, as R. 344. the book of 31. *Hen.* 6. Brooke "Statute," 41.

But ALL THE COURT resolved, and severally delivered their opinions, that those goods, extended before they became bankrupts, and delivered by the *liberate* after they became bankrupts, could not be sold by the commissioners, because they being extended, are *quasi in custodia legis*, so as the conufors have not any power to give, sell, or dispose of them; and although by the *extent* the conufee hath no absolute interest nor property in them until the delivery by the *liberate*, and at the return of the writ may refuse them for being over-valued, yet that is for advantage of the conufee; for the extent is, "*capias in manus nostras ut eas liberari facias*," and they are as goods gaged or distrained; which cannot be forfeited by outlawry, or taken in execution from the party who hath them in gage, or by way of distress, without payment of the money. Vide 30. *Hen.* 6. fo. 10. 22. *Edw.* 4. fo. 11. 34. *Hen.* 8. Brooke "Pledges," 28. & 13. *Rich.* 2. Brooke "Pledges;" for the goods are bound by the *teste* of the writ of extent or execution sued, as 2. *Hen.* 4. fol. 14. 4. *Hen.* 6. fo. 58. & 8. *Co.* 171. The goods are bound by the execution issuing, but the land is bound by the judgment; and by the extent they are to be taken by the conufee, and it is good against the conufor: and the case here is stronger, for that the extent is returned before they became bankrupts, and the delivery by the *liberate* was before the commission of bankrupts was sued out: and it is not like unto the case of 13. *Edw.* 4. *Dyer*, 67.; for there, although the goods were extended, yet they were not delivered to the conufee, and the writ was not returned; and the writ of privilege was for debt due to the king, wherein the king hath his prerogative by the common law: and yet it is said there, that others were of a contrary opinion. Also, when the writ of *liberate* is sued, it hath relation to the writ of extent, and they be *quasi* but one extent; and the goods are so bound by the extent and appraisement, that the conufor hath not any more property in them, but *secundum quid*, and not *simpliciter*; that is, if the conufee refuse to accept them: for it is a conditional writ to deliver them to the conufee, if he will accept them; and when he accepts them, they are bound *ab initio*.—And JONES cited a case, in

Cro. Eliz. 47.  
Judg. Ref. 124.  
Post. 177.

Plow. 62. b.

Cro. Jac. 451.

Hob. 339

See 29. Car. 2. c. 3.

CRO. CAR.

L

the



AUDLEY  
against  
HALSEY.

Post. 282.  
Winch. 20. 50.  
Litch. 20. 52.  
Hutt. 52.

the common pleas, *Brumsted v. Bathurst*, where an under-sheriff took an obligation for his fees, for an extent served before the *liberate*; and it was held not allowable, but he ought to have stayed until the *liberate*. And whereas it was objected, that the writ is not served nor executed until delivery of the goods upon the *liberate*, and therefore the commissioners had power of them, they all conceived, that the statute being with an exception, "where execution or extent " is served or executed," that this is to be accounted the executing of an extent, when the goods be appraised and the writ returned; but so long as they remain in the hands of the consors, they may be sold; but when they are delivered by the *liberate*, the commissioners have no power to meddle with them. And it was said, that the 21. Jac. 1. c. 15. provides, that goods attached by foreign attachment in London shall be sold by commissioners; which proves, that after the 13. Eliz. c. 7. until the 21. Jac. 1. c. 15. the commissioners had no power to meddle with goods taken upon a *foreign attachment*, yet they are but as a pledge to draw the party to answer; and if he appear, the foreign attachment is discharged. Wherefore this extent being returned served, the goods are not subject to other executions, nor to the power of the commissioners. And it was therefore adjudged for the defendant.

## CASE 4.

## Bach against Gilbert.

A vill and a parish shall be intended all one until the contrary be shewn.

Co. Lit. 125. b.  
6. Co. 14. b.  
11. Co. 25. b.  
Cro. Jac. 120.  
263.  
Sayer, 119.  
Burr. 333. 337.

**E**RROR upon a judgment in the common pleas in an ejectment. The error assigned, For that *Jane Herlakenden apud D.* demised an house and forty acres of land in *D. per nomina omnium mesuagiorum, terrarum, et tenementorum suorum in PAROCHIA DE D. seu alibi in comitat. Cant.* Upon not guilty pleaded, the plaintiff surmised, that the said parish of *D.* is in *Rumney*, within one of the Cinque Ports, *ubi breve domini regis non currit*; and that *Allington* is the next village adjoining thereto in the county of *Kent*; and prayed a *venire facias* upon it: and thereupon a *venire facias* was awarded *de viceneto de Allington*; and by them it was found for the plaintiff.

And it was now assigned for error, That this *venire facias* was mis-awarded, and a mis-trial not aided by the statute; for the surmise ought to have been, that *D.* is within the Cinque Ports, and not that the parish of *D.* is within the Cinque Ports; for *D.* may be a village of itself, and the *per nomina omnium terrarum, &c. in parochia de D.* may be the same place.

BUT THE COURT held, that the vill and the parish are intended all one, unless the contrary be shewn, and that this is no error. Wherefore rule was given that the judgment should be affirmed.

## Jenks's Case.

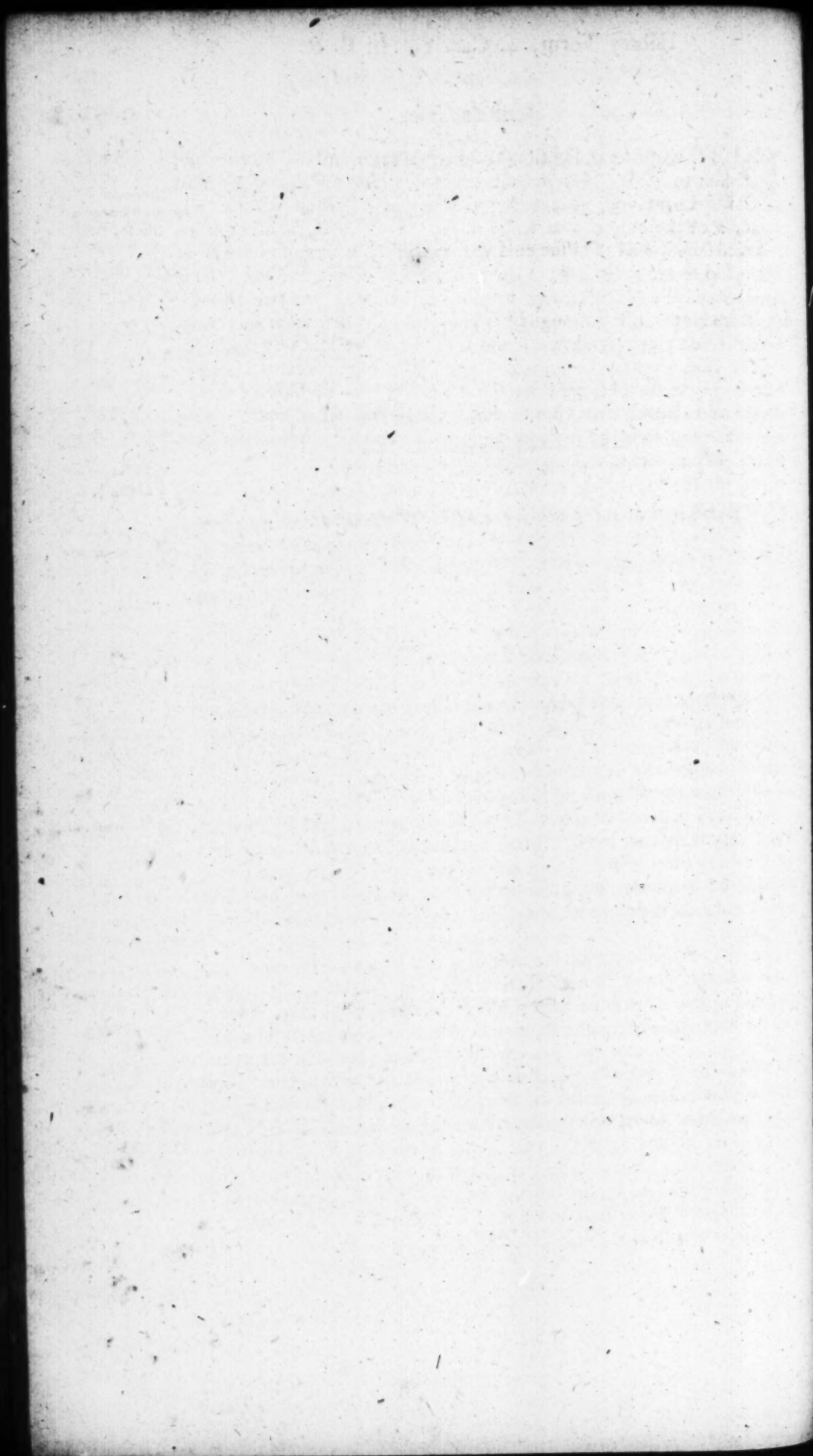
CASE 5.

**D**EBT upon an obligation against the defendant as brother and heir to J. S. The defendant pleaded *riens per descent* (a) from his said brother; and issue being thereupon, a special verdict was found, that the obligor was seised in fee of such lands, and had issue, and died seised, and the issue died without issue, whereupon the lands descended to the defendant, as heir to the son of his brother. *Et si super totam, &c.*—And, after argument, IT WAS ADJUDGED for the defendant. For although he is chargeable as heir upon this bond, yet he is but a collateral heir; and it ought to be specially declared, and the issue ought to be joined accordingly: but upon this issue it is found against the plaintiff; for the defendant has nothing as immediate heir to his brother, but by descent from the son of his brother; and if he would charge him, he ought to have made a special declaration. Wherefore it was adjudged for the defendant.

In debt against a collateral heir, the mesne descent must be specially shewn in the declaration. Cro. Eliz. 24. Dyer, 366. 368. 1. Lutw. 507. Plowd. 441. F. N. B. 120. Cro Jac 161. Pop. 55. 1. Vern. 400. 2. Ch. Caf. 175. Carth. 127 in point.

2. Bl Rep 1099. Bull. N. P. 176. 300.

(a) See 29. Car. 2. c. 3. and 3. & 4. Will. & Mary, c. 14. Post. 296.





## Easter Term,

5. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir James Whitlock, *Knt.*Sir George Croke, *Knt.*} *Justices.*Sir Robert Heath, *Knt. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*James Hyott *against* Hoxton and Broughton.

CASE 1.

**E**RROR in the king's bench, upon a judgment in *audita querela* in the common pleas by *Hoxton* and *Broughton*, surmising, WHEREAS they were bound in a statute, acknowledged before the mayor of *Hereford* to *Hyott*, and he sued execution upon that statute, and thereupon the said *Hoxton* was taken, and let at large by the sheriff of *Salop*, with the assent of the said *Hyott*, whereby they were to be discharged of any other execution against them; that notwithstanding the said *Hyott*, to vex the said *Hoxton* and *Broughton minus justè*, by virtue of an inquisition found before the sheriff of *Salop* and the sheriff of *Hereford*, such a day and year, the lands and goods mentioned in the inquisition *eidem Jacobo deliveravit*, where it ought to have been by the two sheriffs *deliberari procuravit*; otherwise it is insensible that the plaintiff should deliver to himself.

And this assigned for error, That the declaration was insufficient, it not appearing that the said goods and lands so extended were delivered by any sheriff but by the party himself; and so much the rather, because the judgment being, that they shall be restored to what they lost, it doth not appear what they lost, nor what was delivered in execution.

BUT ALL THE COURT conceived it to be no error; for the writ is good enough, which shews sufficient cause of discharge; and comprehending that he is *minus justè* grieved, by delivery of their lands in extent, it is sufficient without other declaration; and when the declaration is good in point of the cause of discharge, although the matter be ill in point of aggravation of damages, yet the writ being good, and the issue taken upon the cause of discharge, and found for him, the judgment is good; for the default in the declaration is not material: and as to the objection, that being uncertain, it cannot be referred to enquire what was lost or taken in execution; THEY may very well be supplied by the writ of enquiry of what damages, &c.: and so this writ being found, he may be restored. Whereupon the judgment was affirmed. *Co. Bk. Ent. 234.*

In *audita querela*, if the plaintiff alledge that one consor was in execution and escaped, and that afterwards the consor "the lands of the plaintiff (the other consor) eidem C. deliveravit," where it ought to have been, "by the two sheriffs deliberari procuravit," yet the declaration is good; for it shews a sufficient gravamen, and the defect is only in matter alledged in aggravation of damages.  
Ante, 75. 143.  
Post. 240.  
Co. Ent. 87.  
Dyer, 297.  
Cro. Eliz. 809.  
3. Bull. 308.  
Jones, 90.  
Litch. 122.  
3. Term Rep. 292. 643.

## CASE 2.

## Beare against Woodley.

A grant of an annuity in several sums, beginning and ending at different times, are several rents, and cannot be joined in the same avowry.

S.C. Jones, 207.

Dyer, 306 309.

1. Lev. 109.

Comb 329-347.

Salk. 423.

3. Mod. 209.

5. Mod. 72.

Cro. Eliz. 340.

637. 651.

Yelv 23.

Carth. 342.

**A VOWRY.** Upon demurrer the case was, *J. S.* grants a rent of fourteen pounds *per annum* out of such land, "**HABENDUM** seven pounds *per annum* for thirty-eight years, if *J. D.* live so long, payable at *Michaelmas* and the *Annunciation*; and **HABENDUM** the other seven pounds *per annum*, to begin after the death of *Woodley*, for thirty-eight years, payable at the said two *Feasts*; and if it happen that the said rent of fourteen pounds to be behind, that he may distrain."

The question was, Whether this was one entire rent, or several rents? for that it is but one grant of fourteen pounds in the beginning, and the distress is limited for fourteen pounds, so it is entire also in the distress.

BUT ALL THE COURT resolved, that they were several rents, because they have several beginnings and several endings; and although it be mentioned to be but one in the clause of distress, yet that is to be intended *distributive* to each part thereof. Whereupon it was adjudged for the avowant. *Vide* 17. *Edw. 3. pl. 75.* 17. *Aff. 10.* 14. *Eliz. Dyer, 308.* 5. *Co. 54, 55.*

## CASE 3.

## Gosshawke against Chiggel.

*A.* being possessed of a lease for 1000 years,

GRANTS "all

"his term, estate,

"and interest therein to

"*B.* his daughter,

"*habendum*

"to the said *A.*

"and his wife

"for their lives,

"and after their

"decease to *B.*"

The first grant

to *B.* is good,

and the *habendum*

to *A.* and

his wife, with

remainder to *B.*

is void.

Post. 400.

S.C. Jones, 205.

1. Co. 154. b.

10. Co. 95. a.

**EJECTMENT.** Upon a special verdict the case was, One *Crogate* was possessed of a lease for a thousand years of the tenements in question, and by deed poll granted "all his term, estate, and interest therein to *Hester* his daughter, **HABENDUM** to the said *Crogate* and his wife for their lives, and after their decease to the said *Hester*; and if she hath heir of her body, then to her executors and assigns, PROVIDED that she shall pay to *Diana* her sister, after the death of *Crogate* and his wife, ten pounds *per annum* during her life: PROVIDED ALSO, That if the said *Hester* died unmarried, having no issue of her body lawfully begotten, that then this grant to the said *Hester* should be void, and then *Diana* should have the term." It was found that *Hester* was married, and died without issue; *Crogate* and his wife died.

The plaintiff claims by lease from the executors of *Hester*, and the defendant claims under *Diana*, and also by the executors of *Crogate*.—The question was, Whether the plaintiff claiming as executor to *Hester* shall have it?

And it was argued by *GRIGGS*, for the plaintiff, and by *POPES*, for the defendant.

And for the plaintiff was urged, that this is a good grant of the term to *Hester*, whereby she was interested therein, and the *habendum* is void; and the second proviso for the determination thereof is not performed, because she did not die unmarried: and in that point the proviso is good, and the other part of the proviso is to no purpose (for she cannot die unmarried and have issue of her body lawfully begotten); and therefore it is to be rejected. Wherefore, &c.

But

But ALL THE COURT, delivering their opinions *seriatim*, conceived, the plaintiff had not any title, but the defendant had good title: for they agreed that the grant was good; and the HABENDUM to the grantor and his wife for their lives, and after to *Hester*, is void, because it is repugnant to the grant; but the HABENDUM shews the intent of the parties, that the executors of *Hester* shall not have it unless she be married, and hath heirs of her body: and the PROVISIO, "That if she die unmarried, having no issue of her body lawfully begotten, that it should be void," shall have this construction, that if she die unmarried, or married having no issue of her body (for she may not have lawful issue unless she be married), then it shall be void; for that is expounded by the HABENDUM, that he did not intend that the executors of *Hester* should have it, unless that she had issue; so by this construction the words of the deed stand together: and when it was found that she was married, and died without issue, the estate to *Hester* and limitation to her executors is determined.—Whereupon rule was given that judgment should be entered for the defendant, unless other matter were shewn, &c.

GOSHAWE  
against  
CHIGGELL.

Wicks *against* Shepherd.

CASE 4.

*In the Exchequer.*

**ACTION FOR WORDS.** Whereas he was of a good fame, and a suitor to such a woman, to marry her, by which marriage he was likely to have had a good preferment, and was in possibility to obtain her; that the defendant maliciously, and to hinder him of his marriage, used these words to the said woman (in presence of others) of the plaintiff: "He is a sharking fellow, and getteth his living by deceit, and used himself violently to his former wife, and denied her necessaries; and is a needy fellow, and his conditions are wicked; and for his religion he is a *Brownist*." By reason of which words the said woman refused him, and he lost his marriage.

*In slander, special damage is a good cause of action, although the words themselves be not actionable.*  
Post. 269.

The defendant pleaded not guilty; and found against him: and moved in arrest of judgment, that these words are not actionable.

But after argument, because it was shewn that by reason of those words he had lost his marriage, it was held good cause of action, and adjudged for the plaintiff: and afterwards judgment was affirmed in a writ of error in the exchequer chamber. And SIR NICHOLAS HYDE, *Chief Justice*, propounded it to JUSTICE JONES, JUSTICE HARVEY, and MYSELF, Whether this action was maintainable? And we all agreed, that the action well lies for the loss which he hath by speaking those words, otherwise the words without such circumstances will not maintain an action; as it is in the case of *Anne Davies*, 4. Co. 16, 17. a.

Salvia



## CASE 5.

## Salvin against Clerk.

Hilary Term, 20. Jac. 1. Roll 466.

If tenant in tail make a lease for the life of the lessee, and afterward grants the reversion in fee with warranty, which descends upon the issue with assets, it shall be a bar to the tenant, though his right of entry was not taken away.

Ante, 58.

Co Lit. 333.

S. C. Jones, 208.

S. C. Latch 64.

72.

Moor, 256.

1. Salk. 244.

2. Bac. Abr. 90.

in aptis.

Cowp. 622.

**EJECTMENT.** Upon a special verdict the case was, *Alexander Sydenham* was tenant in tail to him and the heirs males of his body, the reversion in fee to *John Sydenham* his eldest brother.—*Alexander* makes a lease for three lives with warranty against all persons, the lease not being warranted by the 32. Hen. 8. c. 28. Afterwards *Alexander*, 16. Eliz. levies a fine of those lands with warranty against all persons, and with proclamations to *Taylor*, under whom the defendant claims, and afterward dies without issue male, having issue *Elizabeth*, mother to *Poynts*, lessor of the plaintiff. After the death of *Alexander*, the said *John*, 30. Eliz. died without issue, the said *Elizabeth* being his niece and heir. In 18. Eliz. the lease for three lives expired; the defendant entered by virtue of a lease from *Taylor*; and *Poynts* enters as heir to *Elizabeth*, and lets to the plaintiff, and the defendant ousts him, &c.

This case was oftentimes argued at the bar, and afterwards at the bench; and all the Justices were of opinion, that judgment should be given for the defendant.

THE FIRST QUESTION was, Whether this warranty in the fine, admitting that it was not with any proclamations and no non-claim, should make a discontinuance in fee, and be a bar to *Elizabeth*, because it did not descend by the death of *Alexander* without issue upon *John*, who had right of the reversion, but upon *Elizabeth* his daughter; and when *John* afterwards died without issue, *Elizabeth* being his heir, whether she be barred by this warranty; or, whether the warranty were determined by the death of *Alexander*?—But ALL THE JUSTICES, except *WHITLOCK*, who spake not to that point, conceived, that the warranty continues, and is a bar to her; for by the estate for life it was discontinued, and *Alexander* had a new fee: and then when he by fine grants that reversion with warranty, the warranty is annexed to the fee, and binds him that hath the right; for the reversion being divested and displaced, the fine and warranty enures thereupon; and by consequence, although the warranty did not descend upon *John*, who had the right of reversion, but upon *Elizabeth*, yet when *John* was dead without issue, the rent descended to *Elizabeth*, and she is barred by the fine; and it is not like to *Seymour's Case* (a), where the reversion was not displaced, nor a fee gained, as it is here. Vide 21. Hen. 6. 52. 22. Edw. 4. tit. "Discontinuance."

If tenant in tail make a lease for life, and levy a fine with proclamations, and die without issue, and five years pass without entry or

THE SECOND POINT was, Whether this fine and non-claim for five years shall bar the daughter?—AND RESOLVED it was a bar: for when *John*, who had right at the time of the death of *Alexander* with issue male, did not prosecute that title, it is a bar, and he shall not have the advantage of entry after the death of the tenant for life, because he hath no other title after his death than he had claim, the remainder-man is barred. Post. 201.—Dyer, 3. Plowd. 378. Cro. Eliz. 200. 3. Keb. 37. 110.

(\*) 10. Co. 95.

before;

before; for his title was by the death of tenant in tail without issue male, and then he might have brought his *formedon*; and when he did not pursue his title after it first vested, he and his heirs, and all claiming by him, shall be barred for ever. And it is not like to the case where tenant for life makes a feoffment, and so commits a forfeiture, and a fine with proclamations is levied, the lessor hath title of entry in respect of the forfeiture; as also when the reversion falls in possession by the death of the tenant for life, and may have election to make his entry within five years after the reversion falls in possession: but here he hath but one title, *viz.* after the death of the tenant without issue male, when he might have brought his action of *formedon*, and not to tarry until the death of the tenant for life. Whereupon it was adjudged for the defendant.

SALVIN  
against  
CLERK.

1. Vent. 241.  
Raym. 219.  
3. Co. 78  
Shep. Touch. 31.  
Co. Lit. 333. b.  
3. Com. Dig.  
359.

### Lynner against Wood.

CASE 6.

**T**ROVER for divers loads of corn. The defendant pleads, and entitles himself to them as tithes severed: and because the plea amounts but to "not guilty," the plaintiff demurred; and shewed for cause, that the plea was therefore not good.

HENDEN, *Serjeant*, would have maintained this plea, because it concerns matter in the realty, *viz.* tithes, and title is pleaded, as it were a confession of the possession in the plaintiff, and as a general bar in action of trespass, and colour given.

*Sed non allocatur*; for this action comprehends title in it; and a plea which amounts but to a general issue is not allowable, it being specially shewn for cause of demurrer. Whereupon without argument it was adjudged for the plaintiff.

In trover for corn, a plea that the defendant was entitled to it as tithes severed, amounts to the general issue.

1. Roll. Rep. 112.  
1. Keb. 305.  
1. Brownl. 5.  
Cro. Eliz. 146.  
262. 485.  
Cro. Jac. 165.  
5. Bac. Abr. 202

319. 10. Co. 88. b. 95. a. Latch. 185. Strange, 651. 1. Com. Dig. 224.

### Ansley against Chapman.

CASE 7.

Michaelmas Term, 3. Car. 1. Roll 842.

**E**JECTMENT of lands in *Tottenham*. Upon a special verdict the case was, *William Lock* was seised in fee of the tenements in question, and of divers others mentioned in the verdict; and having divers sons, *viz.* *Thomas, Matthew, John, Henry, and Michael*, and being bound in an obligation, that forty pounds should be paid annually to his wife during her life, made his will, and thereby devised all his lands by several clauses to several his sons; and amongst others, he devised the land in question to *Michael* and *Henry* his sons, upon this condition, that if they fell to any but to *Matthew Lock* his son, then he to enter, as of his gift; and adds this clause: *ITEM*, "All the houses and lands, which I have given between my sons, is to this purpose, that they all shall bear part

A devise to A, upon condition not to sell but to a particular person, and to pay thereout a proportional part towards the payment of an annuity, passes an estate for life only; for the law will not construe it a fee without some words of perpetuity.

—*Jones*, 211. 6. Co. 16. Cro. Eliz. 378. Cro. Jac. 527. Co. Lit. 9. b. 5. Co. 21. Cowp. 43. 235. 299. 657. 1. Term Rep. 411. 2. Term Rep. 656. 3. Term Rep. 356.

" and

ANSLEY  
against  
CHAPMAN.

2. Lev. 249.  
2. Salk. 685.  
2. Mod. 25.  
2. Vern. 106.  
564. 687.  
Bulst. 194.  
1. Eq. Ca. Ab.  
177.  
3. Burr. 1357.  
Gilb. Dev. 22.  
Cowp. 43.

"and part like, going out of all my houses and lands, towards the payment of my wife's forty pounds *per annum* during her life, which I am bound to pay; and which of my sons refuse to bear their part, I will, that he or they enjoy no part of my bequest given unto them; but my gift given to them shall go to the rest of my well-willing sons."

The question was, Whether upon all this matter *Michael* and *Henry* have an estate *in fee* by this will, or *for life* only? for if it be an estate for life only, the plaintiff, who claims under the heir of *Michael Lock*, hath no title.

And it was argued at the bar for the plaintiff, that it was a fee by this devise to *Michael Lock*.

FIRST, Because the devise is to the eldest son, who should have taken a fee by descent, if not by the devise; and he intended every son should have a fee as well as his eldest.

SECONDLY, By the clause, that they shall not sell unless to *Matthew*, is intended, that they had an estate of inheritance, which they might sell, as 7. *Edw. 6. Brooke* "*Devise*."

THIRDLY, Because it is devised paying such a sum, *viz.* "every one his part of the forty pounds *per annum* to the wife;" which implies, that the deviser intended they should have an inheritance: and it was said, this very case was so resolved in the court of wards, by the advice of the two Chief Justices and the Chief Baron, that the intention of the testator will make it an inheritance. Whereupon, by NOY and GERMYN, judgment was prayed for the plaintiff.

And it was argued by FINCH, *Serjeant*, and WHITFIELD, for the defendant, that forasmuch as there is not one word in the will which speaks of any express intent that he should have a fee, the law will not adjudge it to be so, without an intent apparently to be collected out of the words of the will; and they said, that upon argument in the exchequer by all the Barons, after the said resolution in the court of wards, TANFIELD, *Chief Baron*, (who was one of those that gave the said resolution in the court of wards), was of opinion, that it was not a fee, but for life: and so all the other Barons agreed with him; and they produced the record thereof under the seal of that court.

And afterwards ALL THE COURT here resolved, without open argument, that it was but an estate for life only that passed by this devise. For as to the first reason, before alledged on the other side, it was answered, That the eldest son had not any fee by the devise, but by descent and operation of law. TO THE SECOND, They may be restrained from selling an estate for life; and it doth not appear thereby he intended to give a fee. And TO THE THIRD reason alledged, It is not devised paying such a sum, which is a sum in gross, as it is cited in *Willock v. Hammond*, but that every one shall pay out of his part towards the payment of the forty pounds *per annum* to his wife; which is *quasi* an annual rent out of the

9. Co. 128. a.  
3. Co. 21. a.  
6. Co. 16. a.  
Cro. Jac. 416.  
Cro. Eliz. 378.



the profits of the land, and no sum in gross, and therefore no fee given. And as to that objection in the will, that where he deviseth lands to his several sons, that every one should have fee thereby, as well as in a chattel, it is no law, without his express intent may be collected out of the words; otherwise the law will not construe it to be fee in prejudice of the heir, without the word "*heirs*," or "*in perpetuum*," or which *tantamount*. Whereupon it was adjudged for the defendant.

ANSLEY  
against  
CHAPMAN.

## Thursby against Warren.

CASE 8.

Trinity Term, 4. Car. 1. Roll 217.

**E**RROR of a judgment in the common pleas, in an *assumpsit*, by Elizabeth Warren, executrix of William Warren, where the plaintiff declares, WHEREAS, upon the 18th day of July 1625, the defendant was indebted to the said William Warren, being an attorney of the common pleas, in divers sums of money, *tam pro misis et custagiis per ipsum WILLIELMUM WARREN* for the said Thursby, laid out at his request, for the prosecuting and defending of divers suits for the said defendant, and for his fees in divers Terms, besides his expences and other sums of money laid out by the said William Warren, as servant and solicitor to the said defendant, in divers other courts in *Westminster*, at the request of the said defendant, in prosecution and defence of all his suits in the said courts, and in the court of *Lynn Regis*, being a court of record; as also for his salary, and divers other sums to him due, and to be paid by the defendant for his wages, as steward of divers of his courts in the county of *Norfolk*, and yet to him due and unpaid; and also in divers other sums of money expended by him at the request of the defendant, as well about his other business as for his labour for the same, to him due and unpaid: and the defendant being so indebted to the said William Warren, he, the same day and year, at *Lynn* aforesaid, delivered to him a note in writing, mentioning the said sums (a), amounting to thirty-nine pounds two shillings and ninepence, requiring him to pay it. That the defendant, in consideration of the premises, then and there assumed and promised, that if James Sedgwick, an attorney of the common pleas there present, would peruse the said note, and affirm it to be reasonable, he would pay to the said Warren all the sums mentioned in the said note: and alledgeth in fact, that the said James Sedgwick, the same day, year, and place, upon view of the note, affirmed it to be reasonable; and notwithstanding that the defendant had not paid it to the said William in his life, nor to the plaintiff his executrix, *licet sepius requisitus*.

The defendant pleaded *non assumpsit*; and being found against him, and damages assessed to twenty pounds, and judgment entered,

A writ of error was brought, and the error was assigned, Because he demanded fees as solicitor in other courts where he was not attorney, which is *maintenance* and unlawful; and then the *assumpsit* being void in part, is void in all; so that when entire damages were given, and judgment for all, it is error.

An attorney may maintain an *assumpsit*, in consideration of soliciting a cause in other courts than that in which he is admitted; and a promise to pay him what a third person shall award for his trouble is lawful.  
Ante, 70. 77.  
107. 109.  
Post. 194.  
1. Jones, 208.  
Cro. Eliz. 425.  
760.  
1. Roll. Ab. 17.  
Hobart, 67.  
Lut. 31.  
Skin. 217.  
Cro. Jac. 520.  
570.  
Moor, 656.  
3 Mod. 98.  
2. Stra. 1056.  
1. Com. Dig.  
140. 453  
1. Hawk. P. C.  
542.

(a) See 3. Jac. 1. c. 7. the 2 Geo. 2. c. 23. f. 23. and Ray. 145. Carth. 57. 147. 4. Term Rep. 124.

And

THURSBY  
against  
WARREN.

And ALL THE COURT conceived, that an attorney may very well be a solicitor for his client in other courts as well as in the court where he is attorney, and is allowable, and a promise to pay him for it is lawful; and so may a servant for his master, and it is no *maintenance*, as 19. *Edw.* 4. 3. especially as this case is, having laid out money at his request, and giving a note thereof to a stranger to view whether reasonable or not, and a promise to pay it if by him thought reasonable, which of itself is a sufficient consideration.

Post. 194.  
1. Com. Dig.  
437.

And ALL THE COURT conceived, that a solicitor of an inferior rank, which solicits causes for his clients, may take recompence, and take a promise to repay what sums he shall lay out; but if a person of superior rank should do it, it were *maintenance*, as it is in 19. *Eliz.* Dyer, 356.

ALL THE COURT thereupon agreed, that the *assumpsit* was good, and the judgment was affirmed. See 11. *Hen.* 6. 10. 32. *Hen.* 6. 25. 34. *Hen.* 6. 26.

In *assumpsit* the statute of limitations must be pleaded, though the declaration alledge a promise six years before.

Ante, 115.  
Post. 163. 294.  
381.

NOTE ALSO, that another exception was taken by BANKS, Because the promise was upon the eighteenth day of July 1621, and the breach assigned for not paying upon request was in September 1621, and the action was brought in the common pleas in *Michaelmas Term*, 3. Car. 1. and so above six years after the promise and breach; and then by the 21. *Jac.* 1. c. 16. he ought not to maintain that action.—But because it was not pleaded, though the declaration was in *Michaelmas* 3. Car. 1. the original writ not being certified, nor appearing when it was sued out, THE COURT did not much regard it; and thereupon the judgment was affirmed.

1. Vent. 191.  
2. Vent. 255.  
1. Lev. 110.

2. Saund. 118. 123. Lutw. 243. 257. Cowp. 215. 3. Term. Rep. 124.

---

This Year in *Trinity Term* there was nothing done remarkable.

---

## Michaelmas Term,

5. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

### Gilpin's Case.

CASE 1.

**E**RROR of a judgment in *Kingston*. The error assigned was, If the ancestor devise land in fee to his heir, because in debt upon an obligation made by his father he pleaded "*riens per descent*" the day of the writ; and issue being joined thereupon, the jury found, that the ancestor (whose heir he is, and for whose debt he is sued) was seised in fee of such lands, and by his will devised them to the defendant, being his son and heir, and to his heirs, upon condition that he should pay his debts within a year, and, if he failed, that his executors should sell and pay his debts: they also find, that he entered and did not pay the debts, and the executors after entered and paid the debts and sold the lands: and thereupon the court there adjudged, that it was *assets* in the heir's hands, because he devised it to his son and heir in fee; and for that cause the error was assigned.—But THE COURT here held, that the judgment was erroneous; for although the heir hath a fee, yet he hath it as a *purchaser*, being tied with such condition. Whereupon rule was given to reverse that judgment.

12. Mod. 48. Lut. 798. Ld. Raym. 728. 1. Salk. 241. *contra*; and in *Allen v. Heber*, 1. Bl. Rep. 22. Stra. 1270. it is adjudged that the heir shall be in by descent. 1. Brown's Ca. Ch. 136. 1. Com. Dig. 398. 3. Com. Dig. 19. See *Powel on Devises*, 436.

See the statute of 29. Car 2. c. 3. f. 10. & 11. 3. & 4. Will. & Mary, c. 14.

### Goodwin against Sir Richard Moore.

CASE 2.

**T**HE plaintiff, by *Thomas Goodwin*, his *prochein ami*, against Sir *Richard Moore*, one of the masters of the chancery, by bill in chancery, in trespass of battery and false imprisonment. The defendant, *quoad* the battery, pleaded not guilty; *quoad* the imprisonment he justified, because his father held of him such lands by knight's service, and died seised in his homage, for which he seised the plaintiff as his ward; and issue thereupon. After *mittimus* out of the chancery, these issues were delivered here to be tried; and now this Term a trial was at this bar, and the second issue found for the plaintiff: and it was moved in arrest of judgment,

FIRST, Because the plaintiff sued by *prochein ami*, where he ought to sue by his *guardian*; and for proof thereof the Case betwixt *Jones and Symphon* was cited.—*Sed non allocatur*; because the plaintiff may sue by *guardian* or *prochein ami*, but the defendant shall sue only by *guardian*.

An infant may sue either by *guardian* or *prochein ami*, but shall defend only by *guardian*. Ante, 86. Co. Lit. 135. b. F. N. B. 27. Styles, 369. 2. Inst. 390. 4. Co. 53. b. W. Jones, 177. Palm. 295. Prac. Reg. in Ch. 296.

SECONDLY,



An infant shall **SECONDLY**, Because there were not pledges found.—*Sed non allogenot find pledges. catur*; because an infant shall not find pledges.

4. Inst. 180. 8. Co. 61 b. Co. Lit. 127 2. Leon. 185. Jones, 177. 16. & 17. Car. 2. c. 8.  
4. & 5. Ann. c. 16. 2. Bac. Abr. 515, 516 2. Hawk. P. C. 293.

A *venue* aided **THIRDLY**, Because the battery and imprisonment are alledged to be at one place, and the land holden by knight's service at another place, and the *venire facias* was only from one of the said places.—*Sed non allocatur*; for it is now aided by the statute. Whereupon it was adjudged for the plaintiff.

## CASE 3.

## Kadwalader and Another against Bryan.

A prohibition **P**ROHIBITION by them two upon the 23. Hen. 8. c. 9. Because they being inhabitants in such a town, where such a prebend and his predecessors, time whereof, &c. had used to hold plea of ecclesiastical causes, the defendant sued them upon the statute before the ordinary in causes ecclesiastical concerning defamation. The defendant comes in and pleads, that the cause ecclesiastical being depending in the prebend's court, the inferior judge there requested the superior judge to assume it; and upon this bar it was demurred.

Post. 339. Ante, 97. 2. Roll Abr. 357.

Proceedings in **THE FIRST REASON** alledged was, For that it is not shewn that the ecclesiastical the cause was ecclesiastical, so as the Court might judge whether it were fit to be removed.

alledged — Co. Lit. 303. Lutw. 304. 5. Com. Dig. 78. Hob. 296. Show. 6. Cro. Jac. 351. Carth. 32. 4. Com. Dig. 496. Cowp. 330.

On a cause being removed on **SECONDLY**, For that he did not shew that the request is under seal; and if it be not, it is not sufficient to remove the cause.

*peculiar*, it need not be shewn that the request was under seal. Post. 181.

The 23. Hen. 8. **THIRDLY**, For that it was in a *peculiar* to be removed before the c. 9. extends to ordinary, and so out of the statute, and no cause of prohibition:— suits out of a but upon view of the statute it appears clearly, that it extends as well *peculiar* as well to suits out of the peculiar jurisdiction as out of the diocese. as out of a diocese. — 1. Roll. Rep. 328. Skin 233. 5. Mod. 238.

Cro. Jac. 321. And for the other exceptions, they were not allowed, because being of a cause ecclesiastical it needs not to shew the particular, as in Hob. 16. 101. ing of a cause ecclesiastical it needs not to shew the particular, as in 170. other pleadings, but as generally pleaded, "*concurrentibus his quæ in Hard. 421. "jure requiruntur."* And for request, it is not requisite to have it 5. Mod. 451. shewn under seal; and if it ought, it shall be well intended by the Salk. 549. pleading. In a feoffment there needs no livery to be alledged; nor Carth. 33. 477. in assignment of dower, that it was by metes and bounds needs not Skin. 589. to be pleaded (*a*), for these necessary circumstances shall be intended; and therefore the bar was held good.

Two cannot **Also** a prohibition brought by two cannot be good where the grief join in prohibition where the be several. Whereupon consultation was awarded. injury is several.

(a) See 5. Com. Dig. 73.

## CASE 4.

## Walker against Riches.

If an *elegit* omit **A**N *ELEGIT* issued after judgment; and the writ recited the the words "*et judgment, quod elegit executionem* of the goods and moiety of "*medietatem*" the land; and the writ was, "*Ideo tibi præcipimus, quod bona et à terrarum,*" &c. the sheriff cannot deliver the moiety of the lands.—Dyer, 299. Co. Lit. 290. Cro. Jac. 693. 1. Vent. 259. 2. Vent. 171. Carth. 453. Dougl. 473.

"*catalla*"

"*catalla*" of the defendant's, "*quæ habuit die judicii prædicti red-  
diti deliberari facias,*" omitting these words, "*et medietatem terra-  
rum et tenementorum prædictorum, tenendum*" the said goods and  
moiety of the lands "*quousque debitum leveter.*" By virtue hereof  
the sheriff extended the lands and goods, and delivered the moiety  
of the land, and returned the inquisition.

And it was now moved by CALTHROP, that this writ might be  
amended (for it is but a misprision of the clerk), and that the extent  
might stand.

But IT WAS RULED, that it shall not be amended, and that he  
ought to have a new *elegit*, because the inquisition was taken without  
warrant, the sheriff having no warrant to extend those lands.

## Topfall against Edwards.

CASE 5.

**A**CTION ON THE CASE FOR WORDS, for calling him  
"thief," and for procuring him to be indicted and imprisoned  
for felony, until he was acquitted. Upon not guilty pleaded, and  
found for the plaintiff, and ten shillings damages (so under forty  
shillings),

It was moved upon the 21. Jac. 1. c. 16. (which appoints, that in  
action for words, where the damages are assessed under forty shillings,  
that he shall have no more costs than damages), that he should have  
but ten shillings for costs.

But THE COURT conceived, forasmuch as this was not an action  
for words only, but also an action upon the case in nature of a con-  
spiracy, and the defendant is found guilty of both, he shall have  
judgment for his ordinary costs, and that it is out of the statute.

Ld. Raym. 1588. 2. Com. Dig. 546. Carth. 225. Dougl. 245. 1. Ter. Rep. 655.

## Trankersley against Robinson.

CASE 6.

**A**SSUMPSIT against an administrator upon a promise by the  
intestate; supposing, that the intestate borrowed of the plain-  
tiff, upon the first day of May, 12. Jac. 1. twenty pounds, and in  
consideration thereof promised to repay it him upon request; and  
that the plaintiff, upon the first of August, 12. Jac. 1. requested the  
payment, and he had not paid it; and that the intestate died, and  
administration was committed to the defendant, who upon request  
had not paid it, although he had assets. Upon *non assumpsit* pleaded,  
the verdict was found for the plaintiff.

WARD, Serjeant, moved in arrest of judgment, that this *assumpsit*  
being made 12. Jac. 1. and the breach in the same year, this action  
is brought too long after; for by the 21. Jac. 1. c. 16. of Limita-  
tions, it should be brought within six years.

JONES and WHITLOCK conceived the defendant ought not to  
have the advantage of this statute, unless he had pleaded it, or had  
demurred thereupon; because the statute hath divers exceptions; so  
that if it be brought after the time, yet if the plaintiff were an infant,  
or *feme covert*, &c. it were well enough.

But HYDE, Chief Justice, and I, conceived, forasmuch as it ap-  
peareth by the plaintiff's own shewing in his declaration, that it is  
out of the limitation of the statute, and the statute is in the negative,  
"that

WALKER  
against  
RICHES.

In an action for words, and caus-  
ing him to be im-  
prisoned, the  
plaintiff shall  
have costs, though  
the damages be  
under 40s.  
Ante, 141.  
Post. 307.  
3. Mod. 39.  
1. Ven. 48.  
Raym. 487.  
Bull. N.P. 10. 11.  
Stra. 192. 645.  
936.  
1. Ter. Rep. 655.

A defendant  
cannot take ad-  
vantage of the  
statute of limita-  
tions upon the  
plaintiff's own  
shewing; but  
must plead it in  
bar, or demur to  
the declaration.  
Ante, 115. 160.  
Cro. Jac. 115.  
Lev. 111.  
Salk. 278.  
Carth. 137.  
1. Com. Dig.  
154.  
Cowp. 215.

**FRANKERSLEY** "that it shall not be brought at all," unless it be brought within the time limited by the statute; therefore the defendants shall have advantage thereof by exception, without pleading. Whereupon the Court would further advise.

*against*  
**ROBINSON.**

## CASE 7.

## Fryer against Fawkenor.

Judgment may be reversed for absurd, prolix, and vitious pleadings, and the clerk fined for entering them on record.

See the King  
v. May,  
Doug. 194.

**E**RROR of a judgment in *Shrewsbury*, in debt, upon an obligation of forty pounds, conditioned to perform an award. The defendant demanded *oyer* of the bond and condition, and pleaded, *quod nullum fecerunt arbitrium*. The plaintiff imparls, and afterward replies, and shews the award and breach. The defendant imparls, and after makes defence, and demands *oyer* of the bond and condition, and pleads the same plea as before. The plaintiff imparls, and after replies *verbatim* as before. The defendant thereupon demurs, and shews causes and reasons that the award is ill, and long argument for the defendant. Then the plaintiff imparls, and after comes and shews divers causes and reasons and book cases, that this arbitrament was good; and all these were entered upon the record; and afterwards judgment was given for the plaintiff.—And for these *absurdities* and *prolixities* in the pleading and defence IT WAS RESOLVED, that it was an erroneous and vitious proceeding. Whereupon the judgment was reversed, and the clerk fined for making such a record.

## CASE 8.

## Dunscomb against Smith.

The replication of *de injuriâ sua propriâ* to a plea of *son assault* must conclude to the country, or it will be bad on special demurrer.

Post. 317.  
Cro. Jac. 589.  
Co. Lit. 126.  
1. Sid. 215.  
2. Saund. 190.  
337.  
Show. 70. Ray. 94. 98. Lutw. 121. 2 Will. 150.

**T**RESPASS of assault, battery, and wounding. The defendant pleaded, that the plaintiff assaulted him, and would have beaten and wounded him, and what he did was in his own defence. The plaintiff replies, that an attachment issued out of the chancery to arrest the defendant, and that by special warrant from the sheriff he arrested him, and laid hands upon him; and the defendant rescued himself and beat the plaintiff *de injuriâ sua propriâ absque tali causâ; et hoc paratus est verificare; unde, &c.* And upon this the defendant demurred generally, without shewing any cause.—And by ALL THE COURT the replication was held vitious, because he did not conclude his plea, *et hoc petit quod inquiretur per patriam*, but relied upon his plea. Whereupon it was adjudged for the defendant.

## CASE 9.

## Adams against Hilks.

In an action of trover and conversion "at the ward of All Saints in Bristol," a *venire facias* "of Bristol," without saying "the ward of All Saints," is good.

Cro. Eliz. 260. 807. Cro. Jac. 222. 308. Cowp. 682.

**E**RROR upon a judgment in *Bristol*. The error was assigned by GERMYN, Because in an action of trover of 4000 lemons *apud Wardam de All Saints in Bristol*, and conversion of them in the same parish, upon not guilty pleaded, the *venire facias* was "of Bristol," where it ought to have been "of the ward of All Saints in Bristol," for that is the place of the conversion, which is the most certain; and compared it to *Arundell's Case*, 6. Co. 14. where a fact was supposed to be in *parochiâ Sanctæ Marię in Westminister*; and the *venire facias* being of *Westminster*, it was ruled there







to be ill, and that it was not aided by the 21. Jac. 1. c. 13. for it is a mis-trial by a wrong *visne*.—But ALL THE COURT held, that the trial was good, and cannot be otherwise; for A WARD in A CITY is but as AN HUNDRED in A COUNTY, and thereof there never shall be any *visne*. And it is not like to the case that was put, where an act is supposed to be done at such a *parish* in such a *ward* in a *city*; there the *visne* shall be of the *parish*. Vide 7. Hen. 6. 38. 8. Hen. 5. 10. Whereupon rule was given, that judgment should be affirmed unless other matter be shewn. And so it was done in the case of *Adams v. Welling* upon a judgment in *Bristol*, where the same exception was taken, and the judgment affirmed, unless, &c.

ADAMS  
against  
HILKES.

— against Hopkins.

CASE 10.

**EJECTMENT.** The plaintiff declares upon a lease made by Sir Archibald Douglas and Dame Eleanor his wife, of a house and lands in *Englefield*. Upon not guilty pleaded, it appeared upon the evidence, that the lease was sealed and subscribed by them both, and a letter of attorney made by them to deliver it upon the land *FYNCH, Serjeant, and SHELDON, the King's Solicitor*, thereupon strongly urged, that a letter of attorney by a *feme covert* is merely void, and the lease is only the lease of the husband; so the plaintiff hath failed.

But ALL THE COURT conceived it was a good letter of attorney for both, and the lease well delivered: and it is the lease of them both during the husband's life.

3. Bac. Abr. 305, 306. Cowp. 201. Dougl. 319.

Hill against Thornton.

CASE 11.

**PROHIBITION;** the plaintiff therein surmising, That his father died seised of such lands, which descended to him as heir, and that the defendant by libel in the spiritual court had suggested, that he made a will and devised those lands to his executors to sell, and thereby had bequeathed divers goods and portions of money, &c. and had made the defendant executor therein, who therefore sued in the spiritual court to have probate thereof, *ubi revera* he did not make such a will; and a will of lands ought not to be proved in the spiritual court. And thereupon the defendant appeared, and shewed for cause of consultation, That the said testator made such a will, and made him executor; and that he sued him to prove the said will: whereupon issue was joined, "Whether he made such a will?" After evidence the plaintiff was nonsuited.

Godbolt, for the plaintiff, now moved, that although the plaintiff be nonsuited, yet it doth not appear that the defendant hath cause to have consultation; for it is not shewn that the testator had goods, &c. and then he hath no cause to have probate, for a will of lands needs not be proved; but of goods there ought to be a probate, otherwise he cannot have any action. As if a libel were for tithes to be paid of trees which were not *sylvæ caduæ*, although the issue be upon a collateral point, and found for the defendant, yet he shall not have consultation; for if there be a suit for laying

A consultation granted upon the plaintiff being nonsuited in prohibition on a question, "Whether his father had devised lands to be sold for the payment of legacies, and made bequests of divers goods?" for the bequest of goods is cause ecclesiastic.

Ante, 94. 113. 115. Post. 391. 396. Hobart, 192. Cro Jac. 346. 576. 4 Com. Dig. 511. Cowp. 444. 2 Term Rep. 473.

CRO. CAR.

M

violent



HILL  
against  
THORNTON.

violent hands upon a clerk, and to have damages besides correction, in this case no consultation shall be granted, because he hath no such cause of suit in the ecclesiastical court.

And ALL THE COURT agreed to those Cases; for it appears there, that there was not any cause of ecclesiastical suit; but here in this Case it appears that he hath cause of suit to prove the will for the goods, for otherwise he cannot maintain any action: whereupon consultation was granted, that he might proceed *quoad bona*.—Observe well this Case, and the cause and reason why a consultation was granted, together with the difference between this and *Den's Case (a)*.

(a) Antè,  
p. 114, 115.

## CASE 12.

Benson and his Wife against Flower and Blackwells.

*Qu.* Whether damages and costs recovered in an action for words, and levied by the sheriff, can be assigned by commissioners on the plaintiff's becoming bankrupt before the return of the writ?

Post. 1

S. C. Jones, 215.

Cowp. 25.

Cook's B. L.

406.

1. Com. Dig.

520.

Dougl. 548.

note (1).

3. Term Rep.

435.

**A**CTION ON THE CASE for words spoken of the wife.— Upon not guilty pleaded, and a verdict for the plaintiff, and five pounds damages assessed, and seven pounds for costs, they sue execution, and after the money was levied by the sheriff, and before the return of the writ, the plaintiff became a bankrupt, and by the commissioners of bankrupts the said twelve pounds so recovered were assigned by the name of the money of *Benson to Blackwell* and other creditors. The sheriff brings the money into court. The plaintiff who recovered prayed to have the money delivered to him out of court; and the said *Blackwell* and the creditors pray that the money may be delivered to them, according to the sale and assignment of the commissioners.

And, Whether it should be delivered to them? was the question.

*HYDE*, Chief Justice, and *JONES*, conceived, that the sale and assignment were good, and that the money should be delivered to them; for the damages being recovered, and the costs assessed by the judgment, it is a debt, and an action of debt well lies upon this judgment; and the money being levied is properly appertaining to him, and therefore in the power of the commissioners to dispose thereof: and as it may be forfeited to the king by outlawry, or assigned unto the king, and he may cause it to be levied, so may the creditors upon this commission.

But *WHITLOCK* and *MYSELF* were of another opinion, because it being recovered and execution awarded, and the sheriff levying the money before he became a bankrupt, it is, as it were, *in custodia legis*, and the creditors cannot give a discharge, nor are they parties in court who can acknowledge satisfaction; and if the judgment be reversed, they are not compellable to make restitution.—Whereupon THE COURT would further advise (b).

(b) It was moved again this term, and

adjudged, that this money was not assignable by the commissioners.—Post. 176.

## Snape against Norgate.

CASE 13.

**SCIRE FACIAS**; supposing that he recovered in debt against an executor, and had judgment for forty pounds, and seven pounds for costs, *de bonis testatoris, si tantum*; and if not, then *de bonis propriis*; and that before satisfaction he died intestate; and administration was committed to the defendant *de bonis primi testatoris*, and also of the executors; and that the executor had not satisfied; and therefore he sued this writ, to shew cause wherefore he should not have execution. The defendant pleaded *plene administravit* of the goods of the first testator; and issue thereupon, and found for the plaintiff, that he had **ASSETS**.

REEVES now moved in arrest of judgment, that this *scire facias* is not well grounded; for the recovery being against an executor of a debt by the testator, and he dying intestate, the suit is determined, and he ought to commence *de novo*: as if an executor recover a debt of the testator's, the administrator shall not have a *scire facias* upon this judgment; so *à converso*, &c.

HYDE, Chief Justice, doubted; but JONES, WHITLOCK, and MYSELF, conceived, that the *scire facias* was well awarded. For true it is, that as administrator he cannot have a *scire facias* upon a judgment by the executor, but is put to a new action (a); for he comes *paramount* the judgment, and is not party thereto: yet where a judgment is against an executor for the testator's debt, although he die intestate, this judgment might be executed by a *scire facias* against the administrator of the first testator, who cometh in place of the executor, and being for the debt of the testator, is liable thereto; but as administrator to the executor, he is not liable.

THE SECOND EXCEPTION was, Because in the first action of debt, whereupon the recovery was against the executor, the action being for forty pounds upon bond, he pleaded *plene administravit*, and *assets* found to twenty pounds; and the judgment is given against him for forty pounds, whereas it ought to have been but for twenty pounds only: and now in the *scire facias* upon this judgment *assets* is found to forty pounds; which ought not so to have been, but for the twenty pounds, which is found to be *assets* in his hands: and the *scire facias* ought to have been only for that twenty pounds.

But THE COURT conceived, although *assets* to twenty pounds only be found, yet judgment for the entire debt is good; and the *scire facias* being to have execution of forty pounds, and being therein found he had *assets* to forty pounds, it may well be conceived that he had more *assets* after the first verdict and judgment. Whereupon the plaintiff here had judgment according to that verdict.

Harrison v. Beecles, 3. Term Rep. 688.

(a) But now by 17. Car. 2. c. 8. an any executor or administrator. Salt. 322.  
Administrator *de bonis non* may have *scire* Id. Raym. 1072. 6. Mod. 290. 11.  
judgment by or in the name of Mod. 34. 2. Vern. 237.

## CASE 14.

## Chambers's Case.

Ante, 133.

A prisoner committed in execution by one court of justice cannot be bailed by another.

Post. 507. 579.

4. Inst. 47. 62.

12. Rep. 83.

Vaugh. 135.

Dyer, 59.

1. Mod. 144.

Ld. Raym. 938.

1105.

1. Burr. 460.

1. Wils. 299.

11. St. Tr. 317.

2. Bl. Rep. 755.

3. Wils. 188.

2. Hawk. P. C.

ch 15. f. 73. 77.

3. Com. Dig.

456.

Vide the case of

Petit v. Ad-

dington, Trinity

**C**HAMBERS was brought by a *habeas corpus* out of THE FLEET, and returned, that he was "committed to the Fleet by virtue of a decree in THE STAR CHAMBER, by reason of certain words he used at the council table, viz. That the merchants of England were screwed up here in England more than in Turkey." And for these and other words of defamation of the government, he was censured to be committed to the Fleet, and to be there imprisoned until he made his submission at the council table, and to pay a fine of two thousand pounds.

And now at the bar he prayed to be delivered, because this sentence is not warranted by any law or statute; for the statute of 3. Hen. 7. c. 1. which is the foundation of the court of star chamber, doth not give them any authority to punish for words only.

But ALL THE COURT informed him, that the court of star chamber was not erected by the 3. Hen. 7. c. 1. but was a court many years before, and one of the most high and honourable courts of justice; and to deliver one who was committed by the decree of one of the courts of justice, was not the usage of this court. And therefore he was remanded. Vide 3. Aff. pl. 38. 28. Aff. pl. 34. 21. Hen. 8. c. 20.

Geo. 3. in the king's bench.

## CASE 15.

## Gennings against Lake.

Hilary Term, 3. Car. 1. Roll 612.

A grant from the crown of

"all those messuages called

"Drocomb, and

"all landstothe

"said messuage

"belonging, or

"with them de-

"mised, lately

"belonging to

"the priory of

"A." is good,

although at the

time the posses-

sion of the priory

was surrendered

to the Crown,

and the estate

granted was on-

ly known by the

name of "the

"four closes in

"Drocomb,"

and the land was

not built upon

when surrean-

dered.

Ante, 57.

**E**JECTMENT. Upon not guilty pleaded, a special verdict was found, that the prior of Launceston was seised in fee of the tenements within mentioned, which then were "four closes in North Drocomb, in Launceston; and upon the 28th September, 27. Hen. 8. demised them to John Peres by the name of "the four closes in Drocomb, within the borough of Launceston, HABENDUM for ninety-nine years, rendering twelve pounds per annum." Afterwards, in the 30. Hen. 8. by indenture inrolled, the said prior and convent surrendered all their possessions to king Henry the eighth, who died seised, and by mean descents it came to queen Elizabeth, who, in the four-and-twentieth year of her reign, by her letters patents, granted to Edward Frost and John Walker, and their heirs, totum illud messuagium et tenementum vocat. DROCOMBS, alias DROTONS, ac omnia terras, tenementa, dicto messuagio spectant. vel cum eodem dimissa, situat. jacent. et existent. in LAUNCESTON, in comitat. CORNUBIAE, ac nuper prioratui de LAUNCESTON spectantia; and that those lands by mean conveyances were come to the lessor of the plaintiff; and that before the leases aforesaid, viz. in 21. Eliz. an house was erected upon a rood of land of the said closes by the occupiers thereof, et quod tenementum in narratione praedicta mentionatum eodem messuagio spectabat et pertinebat, and was devised and granted with the said messuage, and was always called and known as well by the name of Drocomb as by the name of North Drocomb; and that the said tenements at the time of the dissolution were parcel of the possessions of the said priory;

3. Keb. 44.

Cro. Jac. 526.

3. Lev. 165.

Plowd. 170.

Moor, 682.

2. Roll. Rep. 151.

3 Com.

Dig. 443.

1. Burr. 626.

Cowp. 9. 6co.

and



and that the said prior had not other lands in *Launceston* known by the name of *Drocomb*, or *North Drocomb*, there, besides the lands in the declaration; and that king *James*, in the eighth year of his reign, demised those lands to *John Eldred* for threescore years, by the name of the four closes late in the tenure of *John Peres* in *North Drocomb*, under whom the defendant claims.

And thereupon these questions were moved:

FIRST, Whether (the lease being made by the name of the four closes in *North Drocomb*, there being no other name known when it came to king *Henry* the eighth) the patent of the 24. *Eliz.* by another name may be good, for that the queen was not well informed?

SECONDLY, The patent being made of a messuage and lands thereto appertaining, and this messuage newly erected after the first year of queen *Elizabeth* (for then all the reversion of the said four closes is found by the verdict to come to the queen); Whether the lands shall pass? For although land in the case of a common person may pass by the name of lands appertaining to a house, as it is in *Hill v. Grange* (a), yet it cannot be so in case of the queen; and if it might be, yet it ought to be for a longer time than twenty years to be so demised and occupied, if you would have it to obtain a reputation of passing by the word *pertaining*.

But ALL THE COURT conceived, that the patent is good for the messuage and all the land, notwithstanding these exceptions: for although the land was not built upon when it was demised, and when it came to the king, and that afterwards a messuage was erected thereupon, or it were afterwards converted into another nature before the patent, yet it shall be granted as it is, and by such name as it is known at the time of the patent; and although it varies from the first name in the lease, yet being found to be all one, it passeth well by the patent.

Also they conceived, that land may be said to be appertaining to an house, as well in the king's case as of a common person, where it hath been let and occupied together by a convenient time. *Vide Co. Ent.* 384. *Dyer*, 362.—And afterwards it was adjudged for the plaintiff.

(a) Pl. Com. 170. b.

### Edgar and Webb against Sorrell.

CASE 16.

TRESPASS by original for divers loads of wheat. The defendant justifies, for that THE DEAN AND CHAPTER *sanctæ et individue Trinitatis* in NORWICH, ex fundatione regis EDVARDI SEXTI, were seised in fee of the rectory of *Henley*, in the county of *Suffolk*, wherein the said loads of corn were growing, and severed from their nine parts, which he took by their commands; and so justifies, and gives colour to the plaintiffs.

The plaintiffs reply, that the said dean and chapter were seised in fee, and that one *Thomas* — was dean, and he and the chapter by indenture, by the name of *Thomas* —, decanus *sanctæ et individue Trinitatis*, &c. (omitting the words *ex fundatione regis EDVARDI SEXTI*) and the chapter demised that rectory to *Thomas*

*Gooch*

GENNINGS  
against  
LAKE:

A grant from the Crown of a house cum pertinentiis will pass land that was occupied with the house.

1. Co. 43.  
10. Co. 67.  
2. Roll. Ab. 199.  
3. Com. Dig. 447.  
Cowp. 808.  
1. Burr. 626.

Post. 308.  
Ante, 17. 57.

In trespass for taking a load of wheat, if the defendant justify for tithes under a scoffment from the dean and chapter of the rectory, it shall be intended there was glebe land appertaining thereto, whereof a scoffment might be made.

10. Co. 90.  
3. Co. 75. a.

EDGAR and  
WILLIAM  
against  
SOMERSET.

*Gooch* the 9. *Eliz.* for ninety nine years, and from him conveys it by mean assignment to *Richard Maplesden*, and from him to the plaintiffs; and that they were possessed, &c. until the defendant took the said tithes.

The defendant by rejoinder *confesses* the lease, and all the assignments, except the assignment by *Richard Maplesden*, and that he, before the pretended assignment, viz. 22. *Jac.* 1. by feoffment conveyed the said rectory to one *William Wilton*, for which cause the dean and chapter entered into the said rectory as a forfeiture; and the corn being severed from the nine parts, and set out for tithes, he took them by the command of the said dean and chapter, and TRAVERSES the last grant of the term by *Richard Maplesden*.

The plaintiffs thereupon demurred,

Ante, 101. 162.  
Co. Lit. 303. b.  
Cro. Jac. 411.

GERMYN, for the plaintiff, now shewed his reasons: FIRST, Because the defendant, in the rejoinder, pleaded a feoffment of the rectory, and doth not shew that any glebe was appertaining thereto whereof he might make a feoffment.—*Sed non allocatur*; for it shall be intended a good feoffment, and that there was glebe land thereto appertaining. *Vide* 15. *Hen.* 7. 1. 16. *Hen.* 7. 1.

Dougl. 683.

In pleading an  
act done by a  
corporation, as  
entering for a  
forfeiture, a  
deed to enter  
need not be  
shewn

Cro. Jac. 411.  
2. Saund. 305.  
5. Com. Dig. 197.

In pleading a  
lease by dean  
and chapter the  
omission of part  
of their corporate  
name, is fatal.

THE SECOND EXCEPTION was, Because he pleaded an entry after the forfeiture, and shews not a deed of command to enter.—*Sed non allocatur*: for it is not pleaded that any entered by their command after the forfeiture, but that the dean and chapter themselves entered, which shall be intended a sufficient entry; and all necessary circumstances shall be implied. Also the feoffment is not only a forfeiture, but a *disseisin*, being by tenant for years, and then every one may enter on their behalf, where they have right of entry. 11. *Aff.* 2.

THE THIRD EXCEPTION was taken to the replication: for this lease is pleaded to be made by the dean and chapter, omitting part of their name, and for this cause was merely void; and so the plaintiffs had not any title. Wherefore it was adjudged for the defendant.

#### CASE 17.

Sir John Bodwell against John Bodwell.

Michaelmas Term, 2. Car. 1. Roll 457.

In a bill of ANNUITY for an annual rent granted for life, a declaration that the grantee *virtute ejus seifitus fuit in dominico sub ut de libero tenemento*, is good.

S. C. Jones, 217.  
Co. Ent. 49.  
2. Bulst. 148.  
Carth. 355.  
Cowp. 455.

ERROR of a judgment at the grand sessions at *Caernarvon*, in AN ANNUITY by bill for two hundred and twenty pounds, arrears of an annuity granted of twenty pounds, *quas ei debet*; and counts, That the defendant, *Sir John Bodwell*, upon the 4th November, 4. *Jac.* 1. by a deed shewn, had granted to the plaintiff, *John Bodwell*, the said annual rent, by the name of an annuity or annual rent of twenty pounds, HABENDUM to him for his life, by virtue whereof he was seised *in dominica sua ut de libero tenemento*; and for eleven years behind at such a Feast, he brings the action.

The defendant, *Sir John Bodwell*, demands over of the deed; which being entered and read, it thereby appeared, that it was a rent issuing out of a certain parsonage in the said county, with a clause of distress upon the rectory or church of *Kentkelley*, and divers others the rectories in the said county there mentioned: and pleaded, that the said *John Bodwell* granted the said rectory with the

the church of *Kenthekley* to him and his heirs; whereupon he entered therein, and so pleaded it as an *extinguishment*, &c.

The plaintiff *John Bodwell* replies, that there was nothing granted thereby which was pertaining to the said church.

The defendant *Sir John Bodwell* rejoins, that such a piece of land was parcel of the said rectory and church.

Thereupon they were at issue; and it was found for the plaintiff *John Bodwell*, and judgment given for him.

And now error was brought by *Sir John Bodwell*, and several errors assigned upon the record; to which *John Bodwell* pleaded in *nullo est erratum*, and all were over-ruled; and now *ore tenus* he insisted upon other errors.

FIRST, That he declaring upon an annuity, or annual rent granted for life *virtute cujus fuit seifitus in dominico suo ut de libero tenemento*, proves, that it is no annuity, but a *rent-charge*, and that he made it his election to have it as a *rent-charge*; and in proof thereof was cited *Dyer*, 61. & 220.—*Sed non allocatur*; for being an annuity granted for life, although it is no *rent-charge*, yet he may plead *seifitus in dominico suo ut de libero tenemento*: and although such exception were taken by *BENDLOSSE*, in 3. *Edw.* 6. who cited that case, yet the Court notwithstanding resolved for the plaintiff. And *LORD COKE* (a) hath two several declarations in this manner; and yet the plaintiff had judgment.

BODWELL  
ag-ist  
BODWELL.

(a) *Coke's Entries*, 49.

The SECOND ERROR assigned *ore tenus* was, That this bill of annuity is not maintainable, but he ought to have brought an original writ: for the statute of 34. & 35. *Hen.* 8. c. 16. doth appoint, that in *Wales* actions real and mixt shall be sued by *original writ*, and not by *bill*; but actions personal may be there sued by *bill*: and that this is an action mixt, he relied upon 2. *Hen.* 4. pl. 13. and *Fitzherb.* "Rent," 48. Release of actions real is a good bar in this, so release of actions personal; and this being a *franktenement*, is rather real than personal. And *Co. Lit.* 285. affirms, that it is a mixt action.—But ALL THE COURT conceived, an annuity brought by *bill* there is well brought; for being an annuity which charges the person who grants it, though with a clause of distress, not being granted by him for himself and his heirs until election made, and a distress taken, is merely personal. *Vide* 2. *Edw.* 4. 84. *Long Quinto Edw.* 3. 40.; and therefore a release of actions personal is clearly a bar.

An action for an annuity secured on a real estate, with a clause of distress on non-payment, may be brought in *Wales* by *bill*, as well as by *original*; for it is a charge on the person of the grantor.

*W. Jones*, 275. 5. Co. 48. 1. Com. Dig. 105. *Co. Lit.* 285. a. note (r).

NOW, for the defendant, in the writ of error, also moved, that this being not assigned for error, the plaintiff should not have advantage thereof: for the statute refers, "that suits shall be as in *North Wales*;" and clearly in *North Wales* the custom was to sue by *bill* or *plaint*: and if he had assigned that for error, the defendant here might have maintained it by the custom of *North Wales*; as in the Year-Book 36. *Edw.* 1. error was assigned of a judgment in *Wales* in a *quod ei de forceat*; in nature of a *disseisin*, and in *Wales* the *seisin* is alledged *post ultimam pacem proclamatum*; whereas in *England* it is *post primam transfretationem*; and it was maintained by custom of *North Wales*. In *Hilary Term*, 6. *Edw.* 3. *Roll* 28. in this court, error

R. 279. *Vide* 18. *Edw.* 2. Affise, 354. 30 *Edw.* 3. pl. 19.



BODWELL

against  
BODWELL.

Cro. Jac. 48.

error was assigned, Because they held plea of lands in *North Wales*, where the land was held of the king *in capite*; and for that cause it was reversed, and the reason entered upon the roll: so it appears they have jurisdiction to hold plea of lands not held of the king, and that jurisdiction by the statute is in the affirmative; as it is held 11. Co. 64. *Dr. Foster's Case*, and 33. Hen. 8. *Dyer*, 50. and a statute in the affirmative doth not take away a former statute, but they stand together.—But THE COURT did not rely on this point, because for the former reasons they all held, that this judgment was good enough.—And the judgment was affirmed.

CASE 18.

Grosse against Gayer.

Hilary Term, 1. Car. 1. Roll 828.

*Qu.* If the forfeiture upon attainder of *præmunire* relates to the offence, or to the judgment?

W. Jones, 17.

Co. Lit. 129.

391.

3 Inst. 126.

218.

2. Lev. 169.

3. Com Dig.

385.

3. Bac. Abr. 582.

1. Hawk P. C.

85.

2. Hawk. P. C.

644.

2. Willf. 219.

Hargrave's Co.

Lit. 13. b.

Douglass 545.

**EJECTMENT.** Upon a special verdict the case was, *Tregose* was indicted for a *PRÆMUNIRE*, upon a statute of 13. *Eliz.* c. 2. f. 7. and afterwards made a gift in tail of that land, and was after attainted by verdict, and had judgment for the said offence. And it was afterwards found by inquisition, upon a commission out of the exchequer, that *Tregose* was seised in fee of those lands at the time of the offence committed, and that the queen by patent granted those lands to *Sir George Cary*, under whom the plaintiff claims, and the defendant under the title of the tenant in tail. And if, &c.

The principal point argued was, Whether an attainder in a *PRÆMUNIRE* shall have relation to the offence for the forfeiture of his lands, or only to the time of the judgment?

**SECONDLY,** Admitting that this forfeiture shall relate to the offence, Whether this patent after the inquisition, by commission under the exchequer seal (no office being found by commission under the great seal), be good by the statute of 18. *Eliz.* c. 2. which makes patents upon valuable consideration good, notwithstanding there be not any inquisition found by the commission under THE GREAT SEAL?

And *quoad* the first point, THE JUSTICES did not resolve, being a case of difficulty.

If the king claim upon a forfeiture, his title must be found by office, on an inquisition under THE GREAT SEAL.

Co. Lit. 13. 130.

390.

5. Co. 56. b.

5. Co. 52.

Ante, 106.

2. Co. 16.

2. Roll Ab. 182.

Moor, 476.

11. Co. 4. 2.

Cro. Eliz. 85. 1.

4. Com. Dig.

393.

Cowp. 102.

Douglass 547.

But for the second THEY ALL RESOLVED, that by this judgment, "he should forfeit, &c.;" that, in that case, nothing vested in the king until office found (a): and it ought to be an office by commission under THE GREAT SEAL; for the franktenement being in the party offending (and, as this case is, in a stranger by the gift in tail) at the time of the attainder, it shall not be divested from him, and in the king without office by commission under the great seal, which is only an office to entitle the king, and not by inquisition, by virtue of a commission under the exchequer seal, which is but for instruction or information to the king, and for his officers to put the lands holden of the king in charge (b). But here the lands are not come unto the king until the office found. Therefore for this point only it was adjudged for the defendant. And this is out of the statute of 18. *Eliz.* c. 2. *Vide* 1. Co. 42. 3. Rep. 10. 5. Rep. 52. *Plowd.* 486. *Dyer*, 325. 29. Hen. 8. "Charter de Pardon," 52. 27. Hen. 8. "Office *devant Escheator*," 17.

(a) 2. Vcz. 555. 1. Vcz. 269. 4. Co. 58. 9. Co. 95. (b) 4. Com. Dig. 393.

The

The Earl of Pembroke against Boslock and Green.

CASE 29.

**QUARE IMPEDIT** for the church of *Mottesfont*; wherein he counts, That queen *Elizabeth* was seised in fee of the advowson of the said church, as in gross, and presented *Mr. Pinder*, who was admitted, instituted, and inducted: and that afterwards she granted the advowson in fee to *Sir Christopher Hutton*, who by his deed granted to *Sir Walter Sands, knight*, who died seised, which descended to *Sir William Sands* his son and heir, who, in 12. *Jac.* 1. granted the next avoidance to *Henry earl of Danby*, who granted it to the plaintiff; and he, for the disturbance, brings this action. The defendant *Green* pleaded, "*quod prædictus WILLIELMUS SANDS non concessit*," and issue thereupon. And *Boslock* pleaded and confessed queen *Elizabeth's* title, and that, before she had presented *Mr. Pinder*, she presented *Richard Donnel*, who was admitted, instituted, and inducted; and that afterwards the queen presented *Mr. Pinder* (the church being full of the said *Richard Donnel*), who was admitted, instituted, and inducted; and that afterwards the said queen *Elizabeth* granted unto *Sir Christopher Hatton, &c.* as in the declaration, and that he conveyed it to *Sir Walter Sands*, who, 8. *Jac.* 1. let the said advowson to *John Moore*, serjeant at law, for one-and-twenty years, who granted it to *Green* the defendant, and that the church became void by the death of *Richard Donnel*; whereupon he presented the defendant *Mr. Boslock* to it; and traverseth, that the church was void at the time of the institution of the said *Pinder*; and issue thereupon, and found for the plaintiff for that second issue. And upon the first issue a special verdict was found, that at the time of the grant by *William Sands* he was *esquire* only, and not knighted: and upon that also judgment was given for the plaintiff. And upon this judgment error was brought.

THE FIRST ERROR assigned was, Because he counts of a grant by *William Sands, knight*, and it was found he was not knight; and so it being a void grant by that name, and the declaration untrue, judgment therefore ought to have been for the defendant. —But ALL THE COURT conceived, although it is found that he was not knight at the time of the grant, yet it is not material for the issue being, Whether *William Sands* granted, &c. (a), that finding is idle and superfluous, and is not material; but peradventure if the issue had been upon that grant to *Walter Sands, knight*, and the matter had been found, it had been material; as it is in *Dyer*, 300. where the issue was, Whether *SIR THOMAS DE LA WARR, Miles*, LORD DE LA WARR *concessit*? And it was found, that he made that grant in the life of his father, so as he was not then *Lord de la Warr*, nor knight, which was against him that pleaded it. But here the issue is upon the grant by *William Sands*, and whether it appears that he was a knight at the time of the grant or not, is not considerable; for the grant is good enough, and he had good title to grant. *Vide* 4. *Hen.* 6. 1. by *ROLFE*; *1. Leon.* 92. *Moor*, 431. *Cro. Eliz.* 480. 2 *Saund* 308. *Savil.* 112. *Hutton*, 41. 2. *Inst.* 594. *Ld. Ray.* 859. 1. *Bl. Com.* 403. 1. *Term Rep.* 240.

(a) But see *The King v. The Bishop of Chester*, 1. *Ld. Raym.* 305. where the Court held, that this point of the case was mistaken, for that the issue was not upon the grant to *William Sands*, but upon

the grant of the next avoidance.—See also *S. C. Lit. Rep.* 181. 157. 223. *Sir W. Jones*, 215. and *Dyer*, 299. b. pl. 35. *Shower's Cas. in Parl.* 212.

A declaration in *quare impedit* that the king granted the advowson in fee to A. B. who granted it to C. D. knight, &c.; a verdict finding that C. D. was an *esquire*, and not a knight, is immaterial, and shall be rejected as surplusage. *Ante*, 76. 131. *Co. Lit.* 227. *Cro. Jac.* 240. *Hob.* 54. 2. *Roll Ab.* 695. 1. *Leon.* 92.

**PEMBERKE** 21. *Edw.* 4. 71. & 72. 38. *Hen.* 6. 38. 7. *Hen.* 4. 7. 20. *Hen.* 6.  
*against* Bro. 100. where it shall be by an *inquendo*, and the grant shall not  
**BOSTOCK and** be hurt thereby; and when it is admitted in pleading, the finding of  
**GREEN.** the jury shall not prejudice.

Matter pleaded  
 only as induce-  
 ment need not  
 be answered.  
*Ante*, 105.  
*Post*, 386.

2. *Term Rep.*

439.

3. *Term Rep.*

292.

4. *Term Rep.*

37.

THE SECOND ERROR assigned was, That the defendant *Bostock*, in his pleading, pleaded a precedent lease for years to *John Moore* before the grant by him, under whom the plaintiff claims, which is good title for the defendant, and destroys the plaintiff's title, if it be true, which the plaintiff doth not expressly deny, but by his protestation; so it is not denied by the plaintiff; and therefore for this cause the plaintiff ought not to recover; and judgment ought not to be given for him, but for the defendant: and in proof hereof were cited 7. *Edw.* 4. 20. *Dyer*, 119. 12. *Edw.* 4. 7. 9. *Hen.* 6. 26. 10. *Edw.* 4. 9.—*Sed non allocatur*; for although it had been a good plea, and would have destroyed the plaintiff's title, if the defendant had relied thereupon, and the plaintiff ought to have answered it, yet when it is pleaded by way of inducement only to the traverse, and he traverseth other matter in the count, the not answering or making protestation thereto by the plaintiff is not material; and the issue being joined upon the avoidance, and that being found, and not denied by the plaintiff, is not material; for the traverse waits upon the matter precedent. 6. *Co.* 24. *Read's Case*, *Long Quinto* *Edw.* 3. 9. 3. *Edw.* 3. 17. Whereupon the judgment was affirmed.

*Ante*, 145. p.  
 401.

*Cro. Jac.* 636.

2. *Stra.* 925.

*Dougl.* 752. *in*  
*notis.*

1. *Term Rep.*

78.

And THE COURT assessed the damages to fourscore pounds, although the value was found in the verdict to be an hundred pounds *per annum*; yet because the defendant in the writ of error had obtained a writ to the bishop, and his clerk was admitted, instituted, and had gotten the possession, until he was removed by a writ of restitution, which was half a year and more, THE COURT would give but sixty pounds for damages, and twenty pounds for costs.

#### CASE 20.

— against Heylers.

On a verdict for the defendant in assault and battery, if the judge certify that he acted as a constable in the execution of his office, he shall have double costs, though the declaration be erroneous.

2 *Inst.* 236.

*Ante*, 90.

*Post*, 286. 545.

553.

*Hob.* 219. 284.

*Cro. Jac.* 159

251.

*Dyer*, 32. b. —

*Vaugh.* 213.

*Noy*, 32.

1. *Mod.* 184.

1. *Will.* 319.

1. *Burr.* 602.

2. *Burr.*

1162.

2. *Hawk.* P. C. 61.

2. *Com. Dig.* 549.

*Sayer's Costs*, 120.

*Dougl.* 307, and 308. note (81).

And see 21. *Jac.* 1. c. 12. and 21. *Geo.* 2. c. 44.

TRESPASS by husband and wife for battery done to them both *ad damnum ipsorum*.

The defendant pleaded not guilty; and it was found for him, and certified, that he did it as constable in execution of his office; and double costs were prayed, according to the statute of 7. *Jac.* 1. c. 6.

But HENDEN, *Serjeant*, moved, that the declaration was ill, because husband and wife cannot join in battery done to them both, as it is 9. *Edw.* 4. and therefore judgment ought to have been given against the plaintiff upon the declaration, and not upon the verdict; and so no costs ought to have been given.

But ALL THE COURT conceived, because the defendant is found "not guilty," and what he did was as officer, and the statute gives him double costs for his vexation, which vexation appears, the plaintiff shall not take advantage of the insufficiency of the declaration and writ to excuse themselves of costs.



## Jeffes' Case.

## CASE 21.

**J**EFFES was indicted, For that he exhibited an infamous libel, directed to the king, against SIR EDWARD COKE, late Chief Justice of the king's bench, and against the said Court, for a judgment given in the said court in the *Case of Magdalen College*, affirming the said judgment to be treason, and calling him therein "traitor, perjured judge," and scandalizing all the professors of the law, and containing much other scandalous matter; and fixed this libel upon the great gate at the entrance of *Westminster-hall*, and in divers other public places.

A libel on a person who had been a judge, charging him with perjury during the time he was in office, is an indictable offence.

Post. 504.  
2. Term Rep. 473.

And being hereupon arraigned, he prayed that counsel might be assigned him; which was granted, and he had them, but would not be ruled to plead as they advised; but put in a scandalous plea, and insisting upon it, affirmed that he would not plead otherwise.

Counsel assigned on an indictment for a misdemeanor. Post. 504.  
1. Sid. 271.

Whereupon IT WAS ADJUDGED, he should be committed to the marshal, and that he should stand upon the pillory at *Westminster* and *Cheapside* with a paper mentioning the offence, and with such a paper be brought to all the courts at *Westminster*, and be continued in prison until he made his submission in every court, and that he should be bound with sureties to be of good behaviour during his life, and should pay a thousand pounds fine for that offence to the king.

The punishment of pillory may be inflicted for a libel. Post. 504.

5. Co. 125.  
3. Inst. 174.  
Fort. 201.  
5. Com. Dig. P. C. 357.

588. Stra. 934. 8. Mod. 178. 1. Hawk.

## R. C.'s Case.

## CASE 22.

**T**HE same day R. C. was brought to the bar (being removed from *St. Alban's* by *habeas corpus* and *certiorari*, where he was a prisoner, and *attainted* for felony, viz. for horse-stealing). And it was now demanded of him, what he could say why execution should not be done upon the indictment? And because he could not shew good cause to stay the execution, he was committed to THE MARSHAL, who was commanded to do execution: and the next day he was hanged.

The king's bench may award execution to be done by the marshal upon a person attainted of felony, who is brought into court by *hab.*

*corp.* and the record of conviction removed by *certiorari*. Ante, 90 — 1. Sid. 72. 1. Lev. 61.  
1. K. b. 244. 2. Hale, 4. Poph. 131. Cro. Jac. 495. Foster, 140. Strange, 533. 4. Burr.  
286. 2. Hawk. P. C. 656.

## Symms against Smith.

## CASE 23.

**C**OVENANT. Whereas the defendant (reciting that she had an estate for life in such customary lands) covenanted, that she would surrender the estate upon request, and permit the plaintiff to enjoy the said lands, and take the rents, issues, and profits of them; and in fact assigns for breach, that she did not suffer him to enjoy the said lands, but had received the rents, issues, and profits of them from the time of the making of the indenture until the day of the writ, &c.

In covenant by A. to permit B. to enjoy the rents, &c. a breach that A. took the rents and did not permit B. to enjoy, is well assigned; for the taking by A. is a special disturbance. Post. 299.

The defendant demurs upon this declaration. And it was now argued at the bar by BALL, for the plaintiff, and by ROLLS, for the defendant. And the defendant shewed for cause,

§ C. Jones, 213.

1. Lev. 293. Hard. 132. 2. Vent 278. 4. Bac. Ab. 18. Cowp. 125. Dougl. 272. 684.

FIRST,

STANES  
against  
SHIRAZ.

FIRST, That there was not any request alledged for the permission.—*Sed non allocatur*; for the request extends only to the surrender, and not to the permission.

SECONDLY, That he doth not alledge a special disturbance by entry or otherwise.

Several breaches may be assigned in COVENANT, but not in DEBT on bond for performance of covenants.

4. Co. 80. b.  
Cro. Jac. 171.  
8 Co. 89.  
Post. 299.  
2. Burr. 773.

THIRDLY, The breach is too general in assigning, that she received the rents, issues, and profits of the land, without shewing what, so as it might be issuable, and thereby recover in damages as much as the defendant received, according as it shall be proved to the jury.—But THE COURT conceived, that in covenant he may assign as many breaches as he will, though not in debt upon an obligation for performance of covenants (a); for in that case there ought to be a certainty, and certainly assigned; but in a covenant it may be assigned as general as the covenant is. And therefore it was adjudged for the plaintiff. 47. Edw. 3. pl. 3. 46. Edw. 3. pl. 4.

(a) But now by 8. & 9. Will. 3. c. 11. the plaintiff may, in this case, assign as many breaches as he pleases.

### Benson against Flower.

Vide Ante, 166.

#### CASE 24.

Damages and costs paid to the sheriff upon a *ca. sa.* and continuing in the sheriff's hands, are not assignable by the commissioners on the plaintiff's becoming bankrupt before the return of the writ.

Ante, 149.  
Post. 340.

See W. Jones, 215.

Jud. Ref. 126, 127.

1 Peere Will. 253.

Cooke B L. 145.

Dougl. 384.  
1. Term Rep. 103.

THIS Case was moved again the last day of this Term, and the assignment before the commissioners was read in court: and forasmuch as the becoming bankrupt and the assignment of the commissioners were after the writ of execution served, although they were before the return of the writ, JONES, WHITLOEK, and MYSELF conceived, that the money in the sheriff's hand was not assignable, although by the judgment the damages and costs were ascertained, and turned into *rem judicatam*; for it cannot be said to be the bankrupt's money until it be paid to him; and in the mean time it is in the hands of the sheriff, *quasi in custodia legis*. And the case is so much the stronger, because it was upon a *capias ad satisfaciendum*, and the money paid to the sheriff to satisfy the execution, so that it is not due to the plaintiff until it be paid to him: and none may give a discharge thereof but the plaintiff, who is party to the record; and being levied by record, it ought to be delivered unto him, who may acknowledge satisfaction upon the record; and the assignees are strangers to the record, and cannot have the benefit thereof.—It was therefore resolved, by the assent of HYDE, Chief Justice, who first doubted thereof, that this money should be delivered to the party who recovered, he acknowledging satisfaction. *Mod. Rep.* 93.

#### CASE 25.

### Shalmer against Foster and his Wife.

In an action for these words,

"Where is that lying thief thy son? He hath murdered my Aunt, and I

"will prove it;"

19. Post. 37.  
1. Sid. 52.

ACTION FOR WORDS: For that the wife of the defendant spake of the plaintiff, to Anne Rochester the plaintiff's mother, these words: "Where is that lying thief thy son?" innuendo the plaintiff: "He hath murdered my aunt," *quandam* DOROTHEAM STROKE, *amitam defendentis* INNUENDO, "and I will prove it."

it must be averred in the declaration, that the plaintiff was son of the person spoken of. 443.—Cro. Jac. 103. 635. 1. Roll. Abr. 84. 85. Cro. Eliz. 416. 1. Roll. Rep. 79.

Cowp. 697. 4. Term Rep. 217.

The

The defendant pleaded *not guilty*; and found for the plaintiff: and moved in arrest of judgment, that these words are uncertain of whom they were spoken, no precedent communication being alledged to be of the plaintiff, nor that he was *the only son* of the said *Anne Rochester*, to whom the words were spoken: and it may be that she had divers sons, and every of them might have an action as well as the plaintiff; and therefore, without such averment or precedent communication of him, that the standers-by might know without ambiguity who is meant by the words, the action is not maintainable.

SHALMES  
against  
Foster and his  
Wife.

WHITLOCK and MYSELF were of that opinion; for *non constat de personâ*: and, in proof of that point, I cited as a precedent the case of *Harvey v. Chamberlain (a)*, and another case of *Benner v. (a) Cro. Jac. 635.*

HYDE, Chief Justice, and JONES, Justice, doubted thereof, because it was alledged that she spake of the plaintiff, and is found guilty.

But it was thereto answered, that so are the words in every declaration, and so it was in the precedents cited; but because the words be not put in certain, nor aided by averment, the declaration is not good, and cannot be aided by the verdict. Whereupon the Court would advise. *Et adjournatur.*

may be alledged  
in a declaration  
that the defendant  
spoke the words  
to the plaintiff  
and that he was  
the only son of  
the said Anne  
Rochester, to  
whom the words  
were spoken: and  
it may be that  
she had divers  
sons, and every  
of them might  
have an action  
as well as the  
plaintiff: and  
therefore, without  
such averment  
or precedent  
communication  
of him, that the  
standers-by  
might know  
without ambiguity  
who is meant  
by the words,  
the action is  
not maintainable.

See W. Jones  
Jud. Rel. 128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200

Hilary

in an action for  
these words  
"Where is thy  
"lying child?"  
"For? He hath  
"murdered my  
"son, and I  
"will prove it."  
10. Post. 22  
11. Sid. 22

in an action for  
these words  
"Where is thy  
"lying child?"  
"For? He hath  
"murdered my  
"son, and I  
"will prove it."  
10. Post. 22  
11. Sid. 22



## Hilary Term,

5. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir James Whitlock, *Knt.*Sir George Croke, *Knt.*Sir Robert Heath, *Knt. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*} *Justices.*

## CASE I.

## Deckrow and Others against Jenkins.

In ejectment against four, if three be found guilty as to part, and not guilty for the residue, and the fourth is found not guilty generally, the plaintiff may be amerced jointly as to all the defendants.

Ante, 54. 55.  
Post. 453.

Cro. Jac. 134.  
Hob. 54.  
Co. Lit. 125.  
1. Mod. 10.  
Stra. 260.  
Salk. 54.  
Ld Ray. 72.

**EJECTMENT** against four, of an house and twenty acres of land. Three of the defendants were found guilty of the house and ten acres of land, and not guilty of the residue. The fourth defendant is found not guilty generally, and judgment was entered, that he should recover his term in the house and ten acres of land, and costs against the three defendants; and that the said three defendants *capiantur*, and that they be acquitted *quoad residuum*, whereof they be acquitted; and that the plaintiff *quoad* the three defendants, *pro falso clamore*, for so much as they were acquitted; and *pro falso clamore* against the fourth defendant, *sit in misericordia*.

And because there were not two several *misericordias*, **SCILICET**, as to the three defendants, *pro falso clamore*, *pro tanto*, &c, whereof they were acquitted, *quod sit in misericordia*; and *pro falso clamore* as to the fourth defendant, *quod sit in misericordia*; but joint *quoad* all the defendants, *quod sit in misericordia*; it was assigned for error, and much insisted by GERMYN that it was error, Because there ought to have been several amendments; and the joining of both amercements in one is error; and in proof thereof he relied upon 8. Co. 62. *Beecher's Case.*

But BROOME, *Secondary*, affirmed it to be the usual course of that court, that if the one defendant be found guilty for part, and found not guilty for the residue, and the other defendant is found not guilty for all, then the entry is, that the plaintiff be *in misericordia* but once, which is specially entered.

THE COURT thereupon would further advise; and being moved again afterwards. judgment was affirmed. *Vide* 47. *Edw.* 3. 10. 9. *Hen.* 6. 2. 5. *Co.* 59.

NOTE, The prothonotaries said, that it is the usual course to make entries in this manner, yet that sometimes they find entries have been made thus; "that *quoad* the three for so much whereof they were acquitted, that he be *in misericordia*; and for the fourth, that he be *in misericordia* (a).

(a) By 16. & 17. Car. 2. c. 8. no judgment shall be reversed for the want of a *misericordia* or a *capiat*, or because the one is put for the other. By 5. & 6 Will. 3. c. 12. the *capias pro fine* is taken away. On judgments therefore for the plaintiff in the common pleas, they now enter that the fine is remitted; and in the king's

bench they take no notice of any fine or *capias* at all. But if judgment be for the defendant, then it is considered that the plaintiff and his pledges of prosecuting be nominally amerced for his false suit; and that the defendant may go without day. 4. Bl. Com. 398. Salk. 54. 1. Bac. Abr. 508.

## Gryffyth against Jenkins.

CASE 2.

**E**RROR upon a judgment in *Wales*, in a *quod ei desorceat* in nature of a WRIT OF RIGHT.

THE FIRST ERROR assigned was, Because *the writ* being general, *the count* is, that he desorced him of a messuage, and of nine-and-twenty acres of land, thirty acres of meadow, forty acres of pasture, and of twenty acres *de jampna et brueria*, which ought to be shewn in certainty; as in a *præcipe* of twenty acres of meadow and pasture, if he shew not in particular the quantity of every of them and their nature, it is ill.—But here in this *quod ei desorceat* it is well enough; for *jampna* and *brueria* are not intended lands and several sorts, but of one and the same land, which is *beath-ground* whereupon gorse and furze are growing: and in proof thereof was cited the Case of the *Lady Howard v. Caudish* in dower.

EJECTMENT for so many acres of *furze* and *beath*, without shewing how many acres of each, is good; but in a WRIT OF RIGHT a greater certainty is required.

Post. 573.  
Co Lit. 5. 355.  
1. Mod 90.  
2. Burr. 2672.  
Doug. 305.  
1 Term Rep. 11.

THE SECOND ERROR assigned was, That the issue is not well joined, because he pleaded he hath "*majus jus tenendi tenementa prædicta*" than the plaintiff, and he doth not say "*sibi et hæredibus suis*," according to the usual course; for it may be that he was tenant for life, or tenant in tail: and therefore because he did not shew in certainty *que estate*, it was ill.—*Sed non allocatur*; for the Court would not intend he had a lesser estate than in fee; and if he were but tenant for life, it was at his own peril to plead in that manner, for it is a forfeiture of his estate: and it was held to be no error.

Issue joined in a *quod ei desorceat*, on a plea that he hath *majus jus tenendi*, &c. than the plaintiff, is good, without saying *sibi et hæredibus suis*.

Co. Lit. 251. b.

THE THIRD ERROR assigned was, Because the *venire facias* had not fifteen days betwixt the *teste* and the return thereof, but was the next day after the *teste*.—*Sed non allocatur*; for in *Wales* they have their process from day to day in one and the same session. Wherefore the judgment was affirmed. 1. *Saund.* 73.

A *venire facias* in a real action in the grand session in *Wales* may be made returnable the day after the *teste*.

## Gylbert against Fletcher.

CASE 2.

Trinity Term, 4. Car. 1. Roll 1359.

**C**OVENANT against an apprentice for departing from his service without licence (a) within the time of his apprenticeship. The defendant pleaded, that at the time of making the indenture he was within age; and thereupon it was demurred.

Breach of covenant will not lie against an infant apprentice upon his indentures.

It was argued at the bar, that this indenture should bind the infant, because it was for his advantage to be bound apprentice to be instructed in a trade. He is also compellable by the 5. *Eliz.* c. 4. to be bound out an apprentice.

Hutton, 63.  
Moore, 35.  
Cro. Eliz. 653.  
Cro. Jac. 494.  
Stra. 1082. 1132.  
3. Com Dig. 165.

But ALL THE COURT resolved, that although an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years may have the benefit to use his trade, yet neither at the common law, nor by any words of the 5. *Eliz.* c. 4. (b), shall the covenant or obligation of an infant for his apprenticeship

4. Com Dig. 94.  
5. Com Dig. 234.

(a) By 6. Geo. 3. c. 25. if an apprentice absent himself from his service before his time is expired, he shall serve for so long time as he has absented himself, or be committed to the house of correction for three months; but

this does not extend to apprentices giving more than ten pounds, or after seven years elapsed beyond their term.

(b) *Vide* 8. Ann. c. 9. 18. Geo. 2. c. 22. and 20. Geo. 2. c. 45.

2. Vern. 492.  
1. Bl. Com. 466.  
Co Lit. 172. a.  
R. 513.  
Doug. 518.  
1. Term Rep. 40.  
2. Term Rep. bind 159.

**GILBERT**  
*against*  
**FLETCHER.**  
See Mr. Conr's  
edition of Bott's  
Poor Laws,  
pages 503. to 519.

bind him. But if he misbehave himself, the master may correct him in his service, or complain to a justice of peace to have him punished, according to the statute. But no remedy lieth against an infant upon such covenant: and therefore it was adjudged for the defendant. *Vide* 21. Hen. 6. 31. 21. Edw. 4. 6. 9. Hen. 6. 8.

## CASE 4.

Babington *against* Wood.

A bond given in consideration of being promoted to a benefice, conditioned to resign it on request, is not simony.

Hutton, 111.  
Jones, 220.  
Cro. Jac. 248.  
274.  
Raym. 174.  
1. Sid. 387.  
1. Roll. 417.  
*Sed vide*  
Moor, 641.  
Stra. 227. 534.  
1. Vern. 411.  
2. Bl. Com. 280.  
1. Eq. Ca. Abr. 86.  
2. Ch. Caf. 99.  
399.  
Vern. 131. 411.  
Prec. Ch. 182.  
Sayer, 141. and  
see the case of  
Bagshaw v.  
Bosley, 4. Term  
Rep. 78. and  
Partridge v.  
Whiston, 4.  
Term Rep 359.

**D**EBT upon an obligation conditioned, Whereas the plaintiff intended to present the defendant to such a benefice, that if the defendant at any time after his admission, institution, and induction, at the plaintiff's request, resigned the said benefice into the hands of the bishop of London, that then, &c. The defendant, upon oyer of the condition, demurred generally.

And this was argued by GRIMSTON for the plaintiff, and by CALTHROP for the defendant, who shewed, that the cause of demurrer was, For that the condition of the bond being to resign upon request of the patron, it is *simony* and against law, so the bond void.

BUT ALL THE COURT conceived, that if the plaintiff had averred, that the obligation was made to bind him to pay such a sum, or to make a lease, or other act which appears in itself to be *simony*, then upon such a plea peradventure it might have appeared to the Court to be *simony*, and might have been a question, Whether such a bond for *simony* should be void? But as it is pleaded by the condition, it doth not appear that there is any *simony*; for such a bond to cause him to resign may be good, and upon good reason and discretion required by the patron, *viz.* if he be non-resident, or take a second benefice by a qualification, or the like. And a precedent was shewn in *Jones v. Lawrance (a)*, where such a bond was made to resign a benefice upon request, when the son of *Jones* came to twenty-four years of age, to the intent that he then might be presented to it; and it was adjudged good in the king's bench, and affirmed in a writ of error in the exchequer chamber. And ALL THE COURT was of this opinion; whereupon judgment was given for the plaintiff.

(a) Cro. Jac. 248.

## CASE 5.

Keyley *against* Manning.

Trinity Term, . Car. 1. Roll 971.

A royal proclamation is not binding unless it be under THE GREAT SEAL, and therefore it ought to be so pleaded.

Ante, 162.  
Post. 461. 482.  
1. Roll Rep. 172.  
12. Co. 75.  
2. Inst. 63.  
4 Com. Dig.

**C**OVENANT for not building of an house, where the defendant covenanted, That he would erect three houses upon such land demised to him, unless he were restrained by the king's proclamation, &c. The defendant pleaded, that such a day and year the king made a proclamation to restrain building.

The plaintiff thereupon demurred; and the cause shewn was, Because a proclamation was pleaded, and no place expressed where the proclamation was made, and so no *visue*, if issue should have been joined thereupon: also because it is not pleaded to have been made *sub magno sigillo Angliæ*; otherwise it is not good.

And ALL THE COURT were of this opinion upon the first motion, because a proclamation binds not unless it be under THE

GREAT



GREAT SEAL; and if it be denied there can be no issue thereupon, but only "a *multum record*," which cannot be unless he pleads it in the *sub magno sigillo*.—But afterwards, being again moved, JONAS and WHITLOCK seemed to doubt thereof, because when it is pleaded that such a proclamation was made, it shall be intended only made, as in *rescous* it is returned *quod fecit warrantum*, although it be not pleaded to be in writing, yet it shall be intended. But it was thereto answered, True it is, when it is but by way of inducement; but otherwise, when it is the substance of the plea. Whereupon it was adjourned.

The King against Sir John Elliot, Denzell Hollis, and Benjamin Valentine.

AN INFORMATION was exhibited against them by THE ATTORNEY GENERAL, reciting, "That a parliament was summoned to be held at WESTMINSTER *decimo septimo MARTII* *tertio CAROLI regis ibid. inchoat.* and that SIR JOHN ELLIOT was duly elected and returned knight for the county of Cornwall, and the other two burgesses of parliament for other places, and Sir John Finch chosen speaker; that SIR JOHN ELLIOT, "*machinans et intendens, omnibus viis et modis seminare et excitare discord, evil will, murmurings, and seditions, as well versus regem, magnates, præatos, proceres, et justiciarios suos, quam inter magnates, proceres, et justiciarios, et reliquos subditos regis, et totaliter depravare et auertere regimen et gubernationem regni ANGLIÆ tam in domino rege quam in conciliaribus et ministris suis cujuscunque generis, et introducere tumultum et confusionem in all estates and parts, et ad intentionem* that all the king's subjects should withdraw their affections from the king, the twenty-third of FEBRUARY, *anno quarto CAROLI*, in the parliament and hearing of the commons, *falsa, malitiose, et seditiose*, used these words, "The king's privy council, his judges, and his counsel learned, have conspired together to trample under their feet the liberties of the subjects of this realm and the liberties of this house." And afterwards upon the second of March *anno quarto* aforesaid, the king appointed the parliament to be adjourned until the tenth of March next following, and so signified his pleasure to the house of commons; and that the three defendants, the said second day of March, 4. Car. 1. *malitiose* agreed, and amongst themselves conspired to disturb and distract the commons that they should not adjourn themselves according to the king's pleasure before signified; and that the said SIR JOHN ELLIOT, according to the agreement and conspiracy aforesaid, had maliciously, in *propositum et intentionem prædict.* in the house of commons aforesaid, spoken these false, malicious, pernicious, and seditious words precedent, &c.; and that the said Denzell Hollis, according to the agreement and conspiracy aforesaid between him and the other defendants, then and there *falso, malitiose, et seditiose* uttered *hæc falsa, malitiosa, et scandalosa verba præcedentia, &c.*; and that the said DENZELL HOLLIS and BENJAMIN VALENTINE, *secundum agreementum et conspirationem prædict.* et ad intentionem et propositum prædict. uttered the said words upon the said second day of March after the signifying the King's pleasure to adjourn; and the said Sir John Finch the speaker

CRO. CAR.

N

endea-

KING  
against  
MARTIN

CASE 6.

An information against three members of the house of commons for conspiring to disturb the public tranquillity by accusing the administration of an intention to subvert the liberties of the subject and the privileges of parliament, and for an assault by detaining the speaker forcibly in the chair, to prevent an adjournment of the house, &c.

See Hume's Hist. Eng. 6. Vol. 215, 216. and post. 210. and 604. Prin's 4. Inst. 16. 13. Co. 63. Lit. Rep. 326.

THE KING  
again<sup>d</sup>  
SIR J. ELLIOT,  
&c.

endeavouring to get out of the chair according to the king's command, they *vi et armis, manu forti et illicito*, assaulted, evil intreated, and forcibly detained him in the chair; and afterwards, he being out of the chair, they assaulted him in the house, and evil intreated him, *et violenter manu forti et illicito* drew him to the chair and thrust him into it, whereupon there was great tumult and commotion in the house, to the great terror of the commons there assembled, against their allegiance, *in maximum contemptum*, and to the disherison of the king, his crown and dignity: for which, &c."

The court of  
king's bench  
may try and  
punish crimes  
and misdemeanors  
committed by  
members in the  
house of commons.

1. Mod. 66.

6. Mod. 45.

Hob. 111. Salk. 19. Ld. Raym. 938.

To this information the defendants appearing, pleaded to the jurisdiction of the Court, that the Court ought not to have cognizance thereof, because it is for offences done in parliament, and ought to be there examined and punished, and not elsewhere. It was thereupon demurred; and, after argument, adjudged that they ought to answer; for the charge is for conspiracy, seditious acts, and practices, to stop the adjournment of the parliament, which may be examined out of parliament, being seditious and unlawful acts, and this Court may take cognizance and punish them.

Post. 210.

Afterwards divers rules being given them to plead, and they refusing, judgment was given against them, *viz.* against Sir John Elliot, that he should be committed to THE TOWER, and should pay two thousand pounds fine, and upon his enlargement should find sureties for his good behaviour; and against Hollis (a), that he should pay a thousand marks, and should be imprisoned, and find sureties, &c.; and against Valentine, that he should pay five hundred pounds fine, be imprisoned, and find sureties.

NOTE, That afterward in the parliament 17. Car. 1. IT WAS RESOLVED by the house of commons, that they should have recompence for their damages, losses, imprisonments, and sufferings sustained for the services of the commonwealth in the parliament of 3. Car. 1. *Vide postea, fol. 604.* the votes of the house of commons and resolution of the lords concerning the illegality of this judgment, 19. Car. 2.

See Mantissa.

(a) The Lord Hollis brought a writ of error on this judgment pursuant to an order of the house of lords, and on the

15. April 1668 the judgment of the king's bench was reversed by the lords. L. C. B. PARKER'S MSS.

## Easter Term,

## 6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir James Whitlock, *Knt.*Sir George Croke, *Knt.*} *Justices.*Sir Robert Heath, *Knt. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*

## Pew's Case.

## CASE 1.

**T**HOMAS PEW was arraigned for the murder of one *Gardiner*; and upon evidence it appeared, That the said *Gardiner* was a bailiff sworn and known, and under-bailiff to the dean and chapter of *Westminster*; and he having the sheriff's warrant to arrest the said *Thomas Pew* upon a *capias* out of the common pleas, and seeing him in *Shire-lane* within the liberty of *Westminster*, the said *Pew*, seeing him come towards him, drew his sword, and the said *Gardiner* approaching to lay hold on him (not using any words of arrest, as was proved) *Thomas Pew* said (as it was proved upon examination of two witnesses before the coroner), "Stand off! come not near me! I know you well enough: come at your peril!" and the bailiff taking hold of him, he thrust him with his sword that he died immediately.—It was HELD by all the Court, that it was murder; for he coming as an officer to arrest, and not offering any other violence or provocation, although he used not the words "I arrest you," or shewed him any warrant, because peradventure he had not time, nor was demanded the cause, the law presumes it to be malice and murder in him that so kills one being an officer and coming to execute process.

If a defendant kill an officer who is about to execute legal process upon him, he is guilty of murder, though the officer do not use words of arrest, or express his intention of making an arrest.  
 Post. 537, 538.  
 Kely. 66. 115.  
 Sum. 45.  
 Ld. Raym.  
 1302. 1574.  
 1. Hale, 438.  
 446. 458. 460.  
 2. Stra. 882.  
 3. Inst. 52.  
 9. Co. 67. b. 40.  
 Cowp. 830.

Cro. Jac. 280. Fost 132. 308. 312 318. 321.

## Sir Stephen Bord against Cudmore.

## CASE 2.

**E**RROR of a judgment in *debt* in the common pleas. The error assigned was, Because debt was brought in *London* by *Cudmore* as assignee of *J. S.* of a reversion of land in the county of *Somerset*, upon a lease for years made at *London* of the said lands, rendering the rent of twenty pounds yearly at the *Temple Church*, *London*, supposing the lease to be made at the parish of *St. Mary Bow*, in the ward of *Cheap*, *London*, for two years rent behind after the assignment of the reversion and attornment thereto: whereas the action ought to have been brought in the county of *Somerset*, where the land lies, because the privity of contract failing by assignment of the reversion, he is only to maintain the action upon the privity

Debt for rent against the assignee of a reversion upon a lease for years is *local*, and must be brought where the land lies.  
 Post. 143. 188.  
 16. Hen. 7. pl. 1.  
 38. Hen. 6. pl. 15.  
 3. Co. 23.  
 7. Co. 23.  
 Dyer, 49.  
 1. Wils. 165.

3. Mod. 336. Salk. 80. Cro. Jac. 142. Latch. 197. W. Jones, 43. Hob. 37.  
 1. Lev. 259. 2. Lev. 80. 3. Lev. 233. 1. Sid. 401. Carth. 182. 1. Saund. 238.  
 Tidd's Pra. 11. Cowp 176. 3. Term Rep. 387.



SIR STEPHEN  
BORD  
against  
CUDMORE.

in law for the interest of the reversion, and that ought to have been brought in the county of *Somerset*, where the land lies.

And this was agreed on the other side, unless the rent had been reserved payable at *London*, and in that case the action may be laid in *London*, for payment might have been there pleaded, and upon *nil debet* those in *London* might best take cognizance of the payment; and therefore the judgment was well given, and not error.

*Sed vide Cro.*  
*Eliz. 328. 636.*

But ALL THE COURT conceived, forasmuch as the privity of the contract is gone by the assignment of the reversion and the attornment, and the rent follows the land, the plaintiff being only intitled thereunto by reason of his having the land, therefore the action ought to have been brought only in the county where the land lies, and not elsewhere: whereupon the judgment was reversed.

## CASE 3.

## James against Hayward.

If a new gate be erected across a public highway, it is a common nuisance, although it be not fastened; and any of the king's subjects passing that way may cut it down and destroy it.  
*Ante, 132.*  
*Post, 310.*

2. Roll. Ab. 144.

Jones, 221.

Co. Lit. 56.

5. Co. 101.

9. Co. 55.

Salk. 459.

Yelv. 142.

Cro. Jac. 446.

492.

Cro. Eliz. 320.

1. Com. Dig.

217.

2. Com. Dig.

398.

3. Com. Dig.

686.

4. Com. Dig.

166.

1 Hawk. P. C.

362. 364.

TRESPASS for breaking his close, and pulling up, cutting, and casting down a gate.

The defendant justifies, Because the gate was placed cross the highway, and so fixed that the king's subjects could not pass without interruption by reason of the said gate, to the nuisance of the king's subjects; and therefore he pulled up, cut, and cast down the said gate to use the said way.

The plaintiff shews, that he set up two posts on each side of the way, and hung the gate upon one of the said posts, for the preservation of the springs of the wood there from cattle, so as the subjects might pass the said way without prejudice or impediment at their pleasure; and traverseth that the gate was so fixed and tied that the king's subjects could not pass without interruption by the gate.

The defendant, upon that plea, demurred.

THE FIRST QUESTION was, Whether the erecting of a gate cross an highway, which may be opened and shut at the pleasure of passengers, be a common nuisance in itself in the eye of the law? it being an open gate fixed upon hinges that subjects may pass the said way at their pleasure.

SECONDLY, Admitting it to be a nuisance, Whether every one may pull up and cast down the said gate at their pleasure?

HYDE, *Chief Justice*, JONES, and WHITLOCK, for the FIRST, conceived, that the erecting of the gate, although it be not locked or tied, but that every subject may open it and have passage at his pleasure, is a NUISANCE; for it is not so free and easy a passage as if no such inclosure had been; for women and old men are more troubled with opening of gates than they should be if there were none.

But it seemed to ME that it is not any nuisance in itself, being so small a trouble, but much for the public good that there should be inclosures for the preservation of corn and grass from cattle straying. And the law accounts not such petty troubles to be nuisances; for it appears that there are many gates in divers highways which

which have been always allowed: and if it were a nuisance in itself there should not be any gate, for there cannot be any prescription for a nuisance; and the multitude of gates in several ways prove that it never was accounted to be any nuisance; and 2. *Edw. 4. pl. 2.* the erecting of a gate upon the way is pleaded, and admitted to be lawful enough.

JAMES  
against  
HAYWARD.

For THE SECOND, they held, that admitting it to be a nuisance, although the usual course is to redress it by indictment, yet every person may remove the nuisance; and HYDE, *Chief Justice*, JONES, and WHITLOCK, allowed, that the cutting of the gate was lawful; whereupon judgment was for the defendant. And JONES said, that for ancient gates upon highways, it shall be intended they are by licence from the king, and upon a writ of *ad quod damnum* sued out of chancery. But I conceived, that cannot be for a stopping, &c.

A public nuisance may be abated by a private individual.

4. Term Rep. 364.

### Spalding against Spalding.

CASE 4.

ERROR of a judgment given in *Ely*. Upon a special verdict the Case was, That *John Spalding* had issue three sons, *John*, *Thomas*, and *William*. He devised the land in question to *John*, his eldest son, and the heirs of his body, after the death of *Alice*, the devisor's wife; and if *John* died, living *Alice*, that *William* shall be his heir. Also he devised other lands to *Thomas*, and the heirs of his body; and if he died without issue, that then *John* should be his heir. And he devised other lands to *William*, and the heirs of his body; and if all his sons should die without heirs of their bodies, that then his lands should be to the children of his brother. *John* dies, having a son, in the life of *Alice*; *Alice* dies; and *William* enters upon the son of *John*:

A devise to *A.* and the heirs of his body in fee after the death of *B.* and if *A.* die, living *B.* that *C.* shall be his heir, shall be intended if *A.* die without issue in the life of *B.* and not as enuring to defeat the precedent estate-tail.

And, Whether his entry were congeable? was the question.

It was adjudged in the court at *Ely*, that the entry of *William*, the son of *John*, in the life of his brother *John*'s son, was lawful; and this point was assigned for error.

S. C. Bull. 360.  
S. P. 3. Lev. 125.  
434.  
Cro. Jac. 260.  
416.

HEDLEY, *Serjeant*, now moved, that the judgment was well given; for he pretended, this devise being to the heirs of his body, and if he died, living the said *Alice*, that *William* should be his heir, that it is a limitation to the estate of *John*, if he dies in the life of *Alice*, that then *William* should be his heir; for that tantamounts that the land should remain to *William* presently; and it is not mentioned, that if he die, living *Alice*, without heir of his body; so it is a contingent estate to *William*: and he relied upon 7. *Edw. 6. title "Done,"* and the case of *Pell v. Brown* in this court (a).

1. Peere Wma.  
235. 427.  
1. Vent. 230.  
Ferne, 308.  
1. Wils. Rep.  
427.  
2. Wils. Rep.  
196.  
Ld Raym 524.

But ALL THE COURT conceived, upon the whole context of the will, that it is to be construed according to the intent of the party, and that the construction shall be, that if *John* die without issue, living *Alice*, that then *William*, his youngest son, should have it; and it shall not be construed (where he limits it first to *John* and the heirs of his body, that by this limitation he intended, if he died, living *Alice*, that *William* should be his heir), *John* having

5. Burr. 2707.  
Stra. 13. 79.  
3. Com Dig 28.  
Powel on Dev.  
254.  
Gilb. on Dev. 38.  
Cases Temp.  
Talbot, 3.  
Ambler's Rep  
195.

Cowp. 234. Dougl. 264. 321. 337. 345. 1. Term Rep. 346. 3. Term

Rep. 146. 484.

(a) Cro. Jac. 591.

issue,

SPALDING  
against  
SPALDING.

Cowp. 306.

issue, and thereby to disinherit the heirs of *John's* body. And what was his intent appears by the other parts of the will, that the other sons shall have other lands to them and the heirs of their body; and if they all die without issue, that it shall be to his brother's children, not meaning to disinherit any of his children; and it shall not be such a contingent remainder or limitation to abridge the former express limitation. Wherefore they all conceived, that during the time *John* should have heirs of his body *William* should not have the land: whereupon the judgment was reversed.

CASE 5.

Cule against Executors of Thorn.

In *assumpsit* the contingency upon the event of which the cause of action arises must be expressly averred.

Cro. Jac. 404.  
1. Mod. 294.

**A**SSUMPSIT. Whereas *Thorn*, the testator, in consideration that the plaintiff would marry his daughter *Sarah*, promised to give him in marriage with her as much as he gave in marriage with any other of his daughters; and alledges in fact, that he married the said *Sarah*; and that the testator had three daughters, *Alice* married to *Elkin*, and *Anne*, and the said *Sarah*; and that he gave in marriage to the said *Elkin* with the said *Alice* an hundred pounds, and gave to him a bond of one hundred pounds to pay to the said *Elkin* fifty pounds more at three months end after his decease, "if the said *Alice*, or any issue of her body were then living;" and assigns for breach of the promise, that he had paid to him only forty pounds in his life; and that he had required of the defendant his executor, to whom *assets* were left, the said sixty pounds residue, and a bond for the payment of fifty pounds more, and averred that the said *Alice* had such issue alive; and for not paying of sixty pounds residue, and not delivering the bond, he brings this action. The defendant pleaded *non assumpsit*; and found for the plaintiff, and damages assessed to seventy pounds.

And it was moved in arrest of judgment, that this breach is not well assigned: **FIRST**, Because he promised to give as much as he gave with any other daughter; and that extends to as much as he gave in money, and not to the bond.—**SECONDLY**, If it extend to the bond, yet it ought to have been averred, that *SARAH*, or *some of the issue of her body*, was alive, and not that *ALICE and the issue of her body* was alive; and so the breach was ill assigned; and the damages being entire, judgment ought to be for the defendant.

And **ALL THE COURT** was of this opinion, but chiefly for the Second point; but as to the First, some of them conceived, that it extends only to money presently given, but they agreed not therein; but in the last they all agreed. Whereupon it was adjudged for the defendant.



Morgan *against* Green, Administrator of John Green. CASE 6.

**D**EBT; and demands one hundred and twenty pounds. And declares, That whereas the intestate was indebted to J. S. in divers sums of money for wares sold, and that J. S. became a bankrupt, and by the commissioners of bankrupts was so adjudged; and this debt amongst others assigned to the plaintiff, being a creditor; and that the intestate died; whereupon he brought this action against the administrator, &c.

Upon demurrer, it was argued by GERMYN, *for the plaintiff*, and by STONE, *for the defendant*.

And after argument ADJUDGED, that this action lies not; for DEBT upon a simple contract lies not against an executor or administrator: and although it was alledged it being assigned by the commissioners is *quasi* a debt upon record, and the plaintiff enabled to this suit by act of parliament, and therefore *gager of law* lies not; and that for debt forfeited to the king by the common law no *law gager* lies, as is the common experience in the exchequer, where such debts are forfeited and sued; yet THE COURT held clearly, that the being assigned by the commissioners doth not alter the law, but that against an assignee *ley gager* lies; so against such an administrator this action lies not. Wherefore it was adjudged for the defendant.

DEBT will not lie against an executor or administrator upon a simple contract debt assigned by commissioners of bankrupt.

S. C. Jones, 223. Moor, 206.

Co. Lit. 295.

4. Co. 95.

Cro. Jac. 47. 105.

Off. of Ex. 117.

1. Com. Dig.

526, 527.

1. Bac. Ab. 443.

Espinasse Dig.

183.

1. Term Rep.

91. 619.

4. Term Rep.

94.

West *against* Treude.

## CASE 7.

Hilary Term, 5. Car. 1. Roll 318.

**A**CTION ON THE CASE. Whereas he was, and yet is, possessed of a lease for divers years, *ad tunc et adhuc ventur.* of an house, and being so possessed, demised it to the defendant for six months; and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer he the defendant during the said time pulled down the windows, and divers other parcels of the house, and made great waste therein to the prejudice of the plaintiff; whereupon he brought this action. The defendant pleaded "*not guilty*;" and found against him.

STONE moved in arrest of judgment, that this action lies not; for it was the plaintiff's folly to permit the defendant to continue in possession, and to be tenant at sufferance, and not to take course for his security; and if he should have an action, it should be an action of trespass; as *Littleton, Sect. 71*, if tenant at will hath destroyed the house demised, or sheep demised, an action of trespass lies, and not an action upon the case.

But ALL THE COURT conceived, that an action of trespass or an action upon the case may be well brought at the plaintiff's election: and properly in this case it ought to be an action on the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by an action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff.

Either CASE or TRESPASS will lie by a landlord against his tenant at sufferance for despoiling the premises.

S. C. Jones, 124. 224.

1. Roll Ab 104.

3. Lev. 131.

5. Co. 13. b.

Cro. Eliz. 461.

Ld. Raym. 99.

2. Willf. 145.

Carth. 203.

1. Com. Dig.

204.

1. Bac. Ab. 55.

Co. Lit. 57. b.

1. Term Rep. 12.

430. 480. 535.

2. Term Rep.

166. 252.

## CASE 8.

## Bachelour against Gage, Executor of Gage.

An action will lie against a lessee for the breach of an "express covenant" by his assignee of the term, although the lessee has acknowledged the assignee as his tenant by accepting rent from him.

Post 221. 580.

5. Co. 16. b.

3. Co. 24. b.

Cro. Car. 184  
580.

1. Saund. 237.

1. Lev. 259.

Cro. Jac. 334.

522.

Cro. Eliz. 555.

Pop. 120.

Moor. 600.

1. Sid. 266.

2. Vent. 209.

3. Mod. 326.

Strange, 1221.

2. Com. Dig.

563. 642.

Dougl. 461.

463. 764.

1. Term Rep.

310. 441.

3. Term Rep.

393.

(a) Cro. Jac.

399. 421.

Poph. 136.

3. Bulst. 163.

Godb. 276.

1. Roll. Rep. 359.

2. Roll. Rep. 63.

In covenant, a

declaration that

by such an in-

denture *testatum*

*existit* is suffi-

cient.

Plowd. 126.

5. Co. 16.

Cro. Eliz. 195.

Cro. Jac. 383.

522. 537.

2. Leon. 742.

Jones, 229.

5. Com. Dig. 232.

Dougl. 667.

A declaration

in covenant on a

demise of "a

"messuage or

"tenement,"

is sufficiently

certain.

Cro. Jac. 124.

**C**OVENANT. Whereas by indenture, bearing date, &c. be-  
twixt the plaintiff and the testator of the defendant *testatum*  
*existit*, that the plaintiff demised such a messuage or tenement with  
a garden, in the parish of *St. Martin in the Fields*, adjoining to the  
plaintiff's house, to the testator for the term of twenty-one years;  
and the testator, by the same indenture, covenanted for himself, his  
executors and assigns, that he would not erect any building in the  
said garden to the prejudice of the plaintiff's light; the plaintiff al-  
leges in fact, that such an assignee of the testator's against that  
covenant had erected an house in the said garden, to the prejudice of  
the plaintiff's lights in his house adjoining, for which, &c.

The defendant pleads, that the said lessee assigned over his term  
to one *J. S.* who entered and paid his rent to the plaintiff, and the  
plaintiff accepted him for his tenant; and therefore demanded judg-  
ment *si actio*.

The plaintiff thereupon demurred.

And now this Term it was argued by *WILD*, for the defendant,  
and by *CRAWLEY*, Serjeant, for the plaintiff. And for the defen-  
dant,

FIRST, That this covenant lies not against the executor of the  
lessee; for he having assigned over his term, and the lessor having  
accepted the rent of the assignee, the *privity of contract* is deter-  
mined, especially it being a contract which concerns an act to be  
executed upon the land, and therefore runs with the land; and he  
cannot have an action against the lessee himself or his executors:  
and as an action of debt lies not against the first assignee, so cove-  
nant lies not.—But ALL THE COURT conceived, that inasmuch as  
it is an *express covenant* that he shall not build, it shall bind him and  
his executors, and no assignment nor acceptance of the rent by the  
hands of the assignee shall take from him the advantage of suing him  
or his executors upon an express covenant; no more than if a lessee  
had obliged himself in an obligation to pay his rent, his assignment  
over of his term, and the acceptance of the rent by the lessor of the  
assignee, shall not take from him the advantage of the obligation.  
See for this the case of *Brett v. Cumberland* (a).

3. Bulst. 163. Godb. 276. 1. Roll. Rep. 359. 2. Roll. Rep. 63.

SECONDLY, It was moved, that this declaration was not good,  
because it is by such an indenture *testatum existit*, and he doth not  
say expressly that *dimisit et convenit*; and compared it to the case of  
*Browning v. Beston* (b), where it is *continentur in tali indenturâ*, &c.  
and 2. *Edw.* 4. pl. 21.—But ALL THE COURT conceived, it is good  
enough: and the usual course in this court is to declare in this man-  
ner, that by such an indenture *testatum existit*, &c.

522. 537. 2. Leon. 742. Jones, 229. 5. Com. Dig. 232. Dougl. 667.

THIRDLY, Because it is declared that he demised *messuagium sive*  
*tenementum*, which is uncertain.—*Sed non allocatur*: for true it is,  
that so it ought not to be in an ejectment (c), or an indictment upon  
the statute of 8. *Hen.* 6. c. 9. wherein he is to have possession; but  
here it is only a recital of the words of the lease, and to have da-  
mages only. Whereupon it was adjudged for the plaintiff.

621. 633. 3. Leon. 228. 3. Mod. 238. 1. Sid. 295. 1. Term Rep. 11.

(b) Plowd. 141.

(c) *Sed vide Barnes*, 184. 3. Willf. 23.

## Bethyll against Parry.

CASE 9.

**E**RROR of a judgment in *Caernarvon*. The error assigned was, A writ returned by the new sheriff, with a return indorsed by the old sheriff, and signed *A. B. late sheriff, is good*.  
 Because that in 12. *Jac. 1.* a *venire facias* was returned in this manner: "*Per THOMAM RAVENSCROFT vicecomitem. Istud breve cum panello annexo mihi deliberat' fuit per THOMAM HANMER miles, nuper vicecomit' in exitu ab officio suo (a);*" which is not good: for it appears that he was returned by one who had no authority; for in saying *nuper vicecomes*, excludes him that he was not sheriff when he made the return: and then it was without authority, and as no return, or as if it had been returned with a blank; for then it should be ill by the statute of *York, 12. Edw. 2. c. 5.* before the statute of 21. *Jac. 1. c. 13.* which aids such returns after verdict.— See the case of *Rowland v. James (b)*, where, by reason of a blank returned, the trial was held ill.

But HYDE, JONES, and MYSELF held, that it was good enough, for it appears by the record that he was sheriff next before *Thomas Ravenscroft*; for the plaintiff, at the assizes in *July* before, put in his challenge that *Thomas Hanmer*, then sheriff, was cousin to him, and shewed how; and therefore prayed a *venire facias* to the coroners, and the defendant denied the *cousinage*; wherefore the *venire facias* was awarded to the sheriff: and then when, *in exitu officii sui*, he delivered that writ returned *Thomas Hanmer miles*, it is sufficient to satisfy the statute; for he needed not alledge his name of office, for at the common law it was good without returning his name thereto.— Now the statute appoints, "That he who returns shall add his name to the return;" which is sufficient, if it be his christian and surname, and his name of office is not requisite, as in *Dive and Manningham's Case (c)*: then being returned by him, and his name to it, the addition of *nuper vicecomes* (for it shall not be intended that he returned it when he was not sheriff, and made that addition when he delivered it to the new sheriff) shall not make the return void: and divers precedents were shewn, where they were returned in the same manner; all which should be reversed if there should be a reversal hereof; and when by any way or construction the Court may intend it to be good, they so shall intend it. And as it was agreed that these words "*nuper vicecomes*" doth necessarily imply that he was not then sheriff at the time of the delivery of the writ to the new sheriff, so it is to be construed, that by the words "*nuper vicecomes*," he was sheriff at the time of the panel made: and if he had returned it without those words "*nuper vicecomes*" it had been clearly good, then the addition thereof shall not make it ill.—But WHITLOCK, *Justice*, seemed to doubt thereof: wherefore THE COURT would farther advise.

(a) See 20. Geo. 2. c. 37. Dougl. 463. (b) 5. Co. 41. (c) Plowd. 63.



## CASE 10.

## Shepherd's Case.

In pleading title by a copyhold, it is not sufficient to alledge *seisin* in fee and admission, without shewing the grant; but the omission is helped on a collateral issue. Ante, 54. Post, 229.

4. Co. 22.  
3. Bult. 230.  
Hutt. 54.  
Roll Rep. 211  
2. Vent. 144  
182.  
4. Mod. 346.  
Cro Jac. 52.  
103.  
2. Com. Dig.  
530.  
5 Com. Dig. 79.  
4. Bac. Ab. 101.  
113.

**T**RESPASS for breaking his close. The defendant justifies, Because it was the freehold of *J. S.* and he entered by his command. The plaintiff entitles himself, Because the place WHERE is customary land, parcel of such a manor, whereof *J. S.* is seised in fee, &c. and demisable by copy at will in fee; and that *J. N.* was thereof seised in fee by copy, at the will of the lord of the manor, according to the custom, &c. and died seised, so as it descended to two daughters, as heirs of the said *J. N.*; and that at such a court *dominus concessit eis extra manus suas, &c. habendum et tenendum tenementa prædicta* to the said daughters and their heirs, whereby they were seised in fee, and demised to the plaintiff for years.

The issue being joined upon a collateral matter, and the verdict given for the plaintiff, it was moved in arrest of judgment, that the plaintiff had not made a good title; for none may entitle himself to any copyhold, but he ought to shew a grant thereof; and therefore he shewing such a one was seised in fee without shewing the grant thereof, it was not good.

ALL THE COURT were of that opinion, that it was no good manner of pleading.

But HYDE, JONES, and WHITLOCK conceived, it was but a default in the form; and the issue being taken upon a collateral matter, and found for the plaintiff, it is helped by the statute of jeofails.—Whereupon it was adjudged for the plaintiff.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

## CASE 11.

## Nash against Preston.

An equity of redemption is not liable to the dower of the wife of the mortgagee; but the wife of a bargainee shall have dower, although the lands were, by agreement, re-demised to the bargainor and his wife with an equity of redemption

2. Bl. Com. 158.  
Hardres, 466.  
2. Com. Dig.  
206.  
3. Com. Dig.  
128.  
2. Bac. Abr. 127.

**A** BILL IN CHANCERY was referred to JONES, Justice, and MYSELF, to consider Whether one should be relieved against dower demanded, &c.

The case appeared to be, That *J. S.* being seised in fee, by indenture inrolled, bargains and sells to THE HUSBAND for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a pepper-corn; and with a condition, that if he paid the hundred and twenty pounds at the end of twenty years, the bargain and sale shall be void. He re-demised it accordingly, and dies: his wife brings dower.

The question was, Whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage: and upon a mortgage, if land be re-deemed, the wife of the mortgagee shall not have dower. And if

Equity Caf. Ab. 217. 1. Burr. 77. 1. Roll. Abr. 474.

a hus-

a husband take a fine *sur cognifance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have *dower*; for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet in this case we conceived, that by the law she is to have *dower*; for, by the bargain and sale, the land is vested in the husband; and thereby his wife entitled to have *dower*: and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of *dower*; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her *dower*; for it is against the rule of law, *viz.* "where no fraud or covin is, a court of equity will not relieve." And upon conference with the other Justices at *Serjeants-Inn* upon this question, who were of the same judgment, we certified our opinion to the court of chancery, that the wife of the bargainee was to have *dower*, and that a court of equity ought not to preclude her thereof (a).

NASH  
against  
PRESTON.

Co. Lit. 31. b.

221

Cro Jac. 615.

1. Eq. Ca. Ab.

317.

Hard. 463.

Powel on Mort.

75. 302.

2. Bl. Com. 158.

1. Burr. 77.

(a) See Neal  
v. Jewes, 2. Freeman, 43. 66. 71. *contra.* L. C. B. PARKER'S MSS.

# Trinity Term,

## 6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

} *Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### CASE 1.

#### Taylor against Starkey.

*Hilary Term, 5. Car. 1. Roll 385.*

It is actionable to call an attorney a common barrator; for words shall be taken *secundum conditionem personarum.*

*Ante, 40.*

*Post. 460. 510.*

*S. C. Hutt. 104.*

*Moor, 61.*

*Hetley, 139. 143.*

*Hob. 117. 140.*

*1. Roll. Ab. 52.*

*Stra. 1138.*

*1. Com. Dig.*

*183.*

*4. Term Rep.*

*366.*

**E**RROR of a judgment in the common pleas, in action on the case for words. Whereas the plaintiff was, and is AN ATTORNEY of the common pleas; that the defendant, the first of *June, 4. Car. 1.* spake of the foresaid plaintiff these words, "he is a common barrator, a *Judas*, a promoter;" and *1. July, 4. Car. 1.* spake these words of the plaintiff, "he is a common barrator, a cheater, and I will make him to be barred of his practice."

The defendant pleaded not guilty; and it was found against him for the first words, and damages to fifty pounds: and he was acquitted for the words supposed to be spoken *1. July, 4. Car. 1.* Judgment was given for the plaintiff as to the first words, and the fifty pounds damages; and for the defendant for the second words.

TAYLOR, of *Lincoln's-Inn*, assigned for error, That an action lies not: for if it were spoken of a common person, who was not an officer, "that he is a common barrator," an action lies not; and so adjudged in this court (*a*). And here, although he be an attorney who brings this action, yet not appearing there was any such speech of him as attorney, or to scandalize him in his place, the words are spoken of him as of a common person; for the last words, which concern his practice, the defendant is found not guilty.

But ALL THE COURT conceived the action well lies; for it is a great slander to an attorney to be called and accounted "a common barrator," who is a maintainer of brabbles and quarrels, and a quarreller and fighter: and words are to be construed *secundum conditionem personarum* of whom they are spoken. Whereupon the judgment was affirmed.

(a) *Cro Eliz. 171.*

### CASE 2.

#### Johns and Robinson against Dodsworth.

Verdict against two, and separate damages: The plaintiff may sign judgment against both for the damages of one;

**E**RROR of a judgment in an appeal of MAYHEM in *Durham*. The error assigned, Because the plaintiff declaring there, in an appeal against them, that they, with a third, made the *mayhem*, they pleaded several pleas; whereupon several issues were joined, and verdict for the plaintiff; and against *Johns* upon the trial fifty pounds

pounds



pounds damages were found, and against *Robinson* one hundred pounds damages. And the plaintiff prayed judgment against both, for the one hundred pounds damages and costs, and had it.

And now error is brought and assigned, Because the plaintiff hath judgment for the one hundred pounds damages, and doth not release the damages for the fifty pounds.

But THE COURT conceived it to be no error: for the judgment being for the one hundred pounds by the election of the plaintiff, it is a waiver of the other damages, and he cannot have both; therefore he needs not release the damages of fifty pounds. Whereupon the judgment was affirmed.

JOHNS and  
ROBINSON  
against  
DODSWORTH.

Ante, 55.  
Post. 243.

11 Co. 7. 2.  
Carth. 20.  
Lut. 875.  
2. Saund. 26.  
2. Stra. 872.

### Simonds against Mewdesworth.

CASE 3.

Hilary Term, 3. Car. 1. Roll 378.

**D**EBT upon an obligation *quinto Octobris decimo septimo Jacobi*, of three hundred pounds conditioned for the payment of two hundred and ninety pounds in April following.

The defendant pleaded that in *December decimo septimo Jacobi*, by indenture, it was agreed betwixt the plaintiff and divers other creditors of the defendant (to whom the defendant was indebted in divers and several sums of money particularly mentioned), that the defendant, by indenture of bargain and sale, should assure divers lands in the county of *Lincoln* to nine of the creditors, to be sold by them, and the money to be paid amongst the creditors, and assigned to them a lease for years of the customs of wines, and certain other sums of money, which the said creditors by the said indenture accepted; and alledges in fact, that he by indenture bargained and sold the said land to the said nine persons, and made a letter of attorney to receive the sums of money.

The plaintiff thereupon demurs, Because that the indenture sounds in nature of a covenant; and if so, it shall not be in satisfaction, being in itself no satisfaction, nor pleadable in satisfaction of that debt: also admitting it had been a good satisfaction, if performed, yet part thereof not being performed, it is clearly no bar to this action.

Whereupon IT WAS ADJUDGED for the plaintiff; for agreement without satisfaction is to no purpose.

9. Co. 79. Dyer, 75. 356. Plowd. 5. Raym. 203. 451. 1. Mod. 69. 2. Keb. 690. Dougl. 695. 2. Term Rep. 763. See the case of *Heathcote v. Cruikshanks*, 2. Term Rep. 599. 4. Term Rep. 166.

An agreement made between a debtor and his creditors to assure lands and assign goods to trustees to be sold for their benefit, and the produce divided amongst them, cannot be pleaded in bar to an action of debt on bond brought by one of the creditors, though he was a party to the agreement, and the lands were sold by the trustees.

Ante, 85.  
1. Roll. 129.  
471.  
1. Leon. 19.  
Cro Jac. 650.  
254.

Strange, 573.  
Rep. 24. and

### Sands against Trevilian.

CASE 4.

Michaelmas Term, 4. Car. 1. Roll 196.

**E**RROR of a judgment in the common pleas; where *Trevilian*, being an attorney, brought an attachment of privilege against *Sands*, and demanded against him debt of ten pounds; and declares, That he being an attorney there, the said *Sands* retained him to prosecute a suit in the common pleas betwixt one *Symms* and *Worlich*, and desired the plaintiff to be attorney for *Worlich*, and promised to pay him all his fees, and all that he should lay out to counsel and officers of the court in that suit: and shews that he laid out

An attorney may have debt for his fees and disbursements against him who retained him; but for his bill in a cause for one at the request of another,

*assumpsit only lies.* Ante, S. C. 107. 159.—Skin. 217, 218. Cro. Jac. 520. Moor, 366. 437. 453. 1. Hawk. P. C. 542. 2. Ld. Ray. 842. 1. Term Rep. 62. 4. Term Rep. 123.

See 3. Jac. J. c. 7. and 2. Geo. 2. c. 23.

such

SANDS  
against  
TREVILIAN.

such sums, which amount to the money demanded; whereupon he brought this action.

The defendant there pleaded *nil debet*; and found against him, and judgment for the plaintiff.

Error was now assigned, That in this case debt lies not against him who so entreated him to be attorney; for there is no contract between them, nor hath he any *quid pro quo*; but he ought to have had an *assumpsit* (because he did it at his request), if he for whom he is retained doth not pay him his fees.—And thereto agreed ALL THE COURT; but if he should have debt they doubted.

But ROLLS, for the defendant, in the writ of error, shewed, that he well might bring an action of debt, because he retained him, which is a consideration in itself: and he relied upon 37. Hen. 6. pl. 10. if one entreat a carpenter to make such a thing for another, or to serve another for such a time, and promiseth him ten pounds, debt lies; so 17. Edw. 4. pl. 5. if one promise one hundred pounds if he will marry his daughter, he marries at his request, &c. And he shewed a precedent, *Bradford v. Woodhouse* (a), wherein it was adjudged, and affirmed in a writ of error, that debt lies. And he said, there was a difference where one is retained generally for another with such a promise to pay his fees, and as much as he should expend in the suit, there debt lies: but if I retain one to be attorney for another, and promise if the other doth not pay, that I will pay, there if the party for whom the retainer is doth not pay, an action of the case lies against me upon my promise, and not an action of debt (b); but here an action of debt lies.

(b) *Sed vide*  
29. Car. 2. c. 3.  
1. Roll. Ab. 594.

Cro. Jac. 520,  
521.

But ALL THE COURT conceived, that no action of debt lies here, but an action upon the case only: for the retainer being for another man, and he being attorney for another man who agreed to that retainer, there is no cause of debt betwixt him who retained and the attorney, and no contract or consideration to ground this action; and he who is so retained may well have debt for his fees against him for whom he was retained, he having agreed thereto; wherein there cannot be any wager of law; but against the defendant, who is a stranger to the suit, and at whose request he took upon him to be attorney, debt lies not, as 27. Hen. 8. pl. 24.: and in the case of *Rolls v. Germyn* (c), it was so resolved. Whereupon it was adjudged, that the first judgment should be reversed.

Ante, 159.

RICHARDSON, Chief Justice, and HUTTON and HARVEY, Justices of the common pleas, being moved herein, said, that this point was never moved before them (d); and they were of the same opinion, that debt lies not, but only an action on the case.

(a) 16. Jac. 1. Roll 416. (b) Cro. Jac. 520. (c) Cro. Eliz. 425. Moor, 366.  
(d) *Sed vide* S. C. Ante, 107.

#### CASE 5.

#### Poynter against Poynter.

On an *assumpsit* to pay so much if the plaintiff marry the daughter of the defendant at his request, an allegation that he did marry her,

**A**SSUMPSIT. Whereas the plaintiff and defendant having communication that the plaintiff should espouse the daughter of the defendant, the defendant promised, if the plaintiff *ad instantiam defendantis* would marry the defendant's daughter, he would pay to him twenty pounds, and give to him twenty FRENCH PIECES towards their wedding dinner; and alledges without saying at the defendant's request, is sufficiently certain. Plowd. 305. Co. Lit. 403. 1. Lev. 121. Cro. Jac. 404. 552. 2. Vent. 71. 2. Lev. 198.

in fact, that he married the defendant's daughter, and had required him to pay the said twenty pounds, and that he had not paid it; and that the twenty *French* pieces amounted to twenty pounds *English* money, and the defendant had not paid them. Upon *non assumpsit* pleaded it was found for the plaintiff.

POYNTER  
against  
POYNTER.

BERKLEY, *Serjeant*, moved in arrest of judgment, that the declaration is not good; for the promise is but conditional, if he *ad instantiam* of the defendant married his daughter, &c. and he alledges, that he married the defendant's daughter, but he doth not say *ad instantiam defendantis*: so it being a condition precedent, if he hath not averred performance thereof, there is no cause of action.

But ALL THE COURT conceived upon this agreement to marry the daughter *ad instantiam defendantis*, and he marrying her, it shall be intended to be *ad instantiam defendantis*, without averring that he after at the instance of the defendant married her.

A SECOND EXCEPTION was, Because the promise is, "to give to him twenty FRENCH PIECES;" that is, not twenty FRENCH CROWNS, for there may be other pieces.—*Sed non allocatur*; for *French* crowns are the common coin of *France*, and here known, and it shall be intended according to our usual speech. Whereupon it was adjudged for the plaintiff.

*French pieces*  
shall be in-  
tended *French*  
*crowns*.  
Heti. 112.  
1. Bac. Abr. 169.

### Harlow against Wright.

CASE 6.

DEBT upon an obligation conditioned, That if the obligee, his executors, and assigns, from the time of the obligation, may enjoy such land by virtue of such a lease made unto him by the obligor, and then, &c. The defendant pleads, that *post obligationem* until the day of the bill the plaintiff had enjoyed that land. Upon this plea the plaintiff demurs.

A PLEA, to debt  
on bond for the  
enjoyment of  
land, that "*post*  
"*obligationem*  
"*until the day*  
"*of the bill the*  
"*plaintiff en-*  
"*joyed,"* is  
good, though  
it is not said  
*semper post*.  
Ante, 6. 63.  
5. Co. 121.  
Plowd. 26. 33.  
102.

THE FIRST EXCEPTION was, Because the defendant doth not say, "*à die confectiois scripti obligatorii, et semper post confectioem scripti obligatorii*;" for it may be the plaintiff enjoyed "*post confectioem scripti obligatorii*" but "*non semper post*."—*Sed non allocatur*; for a bar is good to a common intent, and it shall be taken that he always enjoyed it unless the contrary be shewn, which must come on the plaintiff's part.

And the de-  
fendant need  
not say that the  
plaintiff en-  
joyed according  
to the words of  
the condition.

A SECOND EXCEPTION was, Because the defendant did not plead, that the plaintiff and his assigns enjoyed it according to the words of the condition; and it was said, that the plaintiff had in truth made an assignment.—*Sed non allocatur*; for it shall not be intended the plaintiff had made an assignment unless he himself shews it, and it ought to be shewn on his part. Whereupon rule was given, that judgment should be entered for the defendant.

But it was moved to have the plaintiff discontinue his suit, for otherwise he should be barred of his debt, whereas he had good cause of action: so THE COURT adjourned it until the next Term, that in the interim he might discontinue.

Judgment sus-  
pended to give  
the plaintiff an  
opportunity to  
discontinue.  
Cro. Jac. 35.

Salmon



## CASE 7.

Salmon *against* Percivall.

If a serjeant at mace of London arrest A. on a plaint in the sheriff's court, and A. tenders him good bail, which he refuses to accept,

A. may have an action on the case for refusing the bail; but he cannot maintain trespass for false imprisonment, the caption being by legal process.

S. C. Jones, 226.

2. Roll. Abr. 561.

Cro. Eliz. 77.

Cro. Jac. 94.

3. Co. 146 b.

1. Leon. 189.

2. Mod. 31.

2. Bl. Rep.

1169. 1190.

1. Com. Dig.

476. 489.

5. Com. Dig.

582.

Cowp. 476.

Dougl. 40.

1 Term Rep.

536.

(a) 1. Bac. Abr. 108. 3. Willf 341. Dougl. 674.

**TRESPASS** of battery, wounding, and imprisonment. The defendant, as to the *wounding*, pleads *not guilty*; and as to the *battery* and *imprisonment* justifies, Because being a serjeant of the mace in London, by custom there, upon a plaint of debt entered in any of the compters against any, he may arrest him against whom such plaint is entered, and carry him to prison until he find bail; and justifies by reason of the plaint entered, &c.

The plaintiff replies, that after the arrest he tendered to him sufficient bail, *viz.* J. S. and J. D. and notwithstanding he detained him in prison, &c. *et hoc, &c.*

The defendant takes issue, that he did not tender him bail; and it was found against him for both issues, and entire damages given.

It was moved in arrest of judgment, that having justified the arrest and imprisonment, the tender of bail is not material; for he is not the party who ought to accept bail, but the Judge in court (a); therefore the issue as to this point is frivolous.

GERMYN, for the plaintiff, objected, that because he refused to take bail, he was a trespasser *ab initio*; as he who enters into a tavern and takes a cup away, or where tenant at will pulls down the house.

But ALL THE COURT conceived, that when he justifies the arrest and imprisonment, although he might have accepted bail (which they all agreed he could not) and refused, that doth not make the arrest and imprisonment *tortious* to have trespass; but he might upon the matter have had an action on the case for detaining him in prison after bail tendered; then when damages are given as well for the battery and imprisonment as for the wounding, the plaintiff ought not to recover. Whereupon it was adjudged for the defendant.

## CASE 8.

Dow and Others *against* Golding.

Hilary Term, 5. Car. 1. Roll 125.

The lord of a manor cannot assess an unreasonable fine upon the surrender and admittance of a copyholder.

Co. Lit. 60. a. note (2).

4. Co. 27. b.

11. Co. 44. a.

13 Co. 3.

2. Bullf. 32.

1070. 2. Com. Dig. 506.

Dougl. 784. and 2. Term Rep. 484.

**TRESPASS.** Upon demurrer, the question was, Whether the lord of a manor may assess two years and a half value of copyhold land according to rack rent for a fine upon surrender and admittance, and for non-payment enter for forfeiture?

And ALL THE COURT conceived, that one year and a half of rent improved is high enough, and the defendant assessing two years and a half it is unreasonable, and therefore the plaintiff might well refuse the payment thereof, and consequently the entry of the defendant for a forfeiture not justifiable: whereupon it was adjudged for the plaintiff.

2. Roll. Abr. 265. Rep. Temp. Finch, 464. 1. Burr. 206. Carth. 13. Stra. 1041. 1070. 2. Com. Dig. 506. 2. Ch. Rep. 134. 2. Bl. Com. 98. See the Case of Astle v. Grant, Dougl. 784. and 2. Term Rep. 484.

## CASE 9.

## Hughes's Case.

On *excom. cap.* if the *significavit* do not shew some of the

causes required by 5. Eliz. c. 23. the king's bench, on *hab. cor.* will quash the writ; but the excommunication continues. Post. 199. 583.—1. Jones, 226. 2. Jones, 89. Show. 16. 1. Roll. Rep. 74. 12. Co. 77. Salk. 293, 294. B. R. H. 314. Stra. 43. 76. 265. 946. 950. 1067. 3. Mod. 42. 89. Latch. 104. 174. 1. Sid. 181. Ld Raym. 619. 817. 1. Peere Wms. 436.

**HUGHES** being taken upon an *excommunicato capiendo*, because he was condemned in the court of the vice-chancellor of Oxford in costs, and had not paid them, the writ of *excommunicato ca-*

*piendo* was awarded upon a *significavit*, returned into chancery, and delivered here into court, according to the 5. *Eliz.* c. 23.

HUGHES'S  
CASE.

He being arrested thereupon, exception was taken, Because it is not exprest to be for some of the causes mentioned in the statute, and so void. And it was demurred thereupon.

Cro. Eliz. 144.

LITTLETON moved, that although the *significavit* doth not mention any of the causes in the statute, but is for other causes, *viz.* for *costs*, yet the excommunication is good: but if any *capias* with proclamations and penalties therein be awarded, these penalties and forfeitures are void, unless the *significavit* exprest it to be for one of the causes mentioned in the said statute; but the excommunication itself is good enough. And so it was resolved in this court, upon long deliberation and debate, in the Case of one *Brown*, although some while before, upon sudden motion, and not well observing the words of the statute, some had been discharged of such *excommunicato capiendo*.

JONES and HYDE said, they well remembered *Brown's Case* to be so resolved; but none being there of the part of *Hughes*, they gave further day to be advised thereof.

Bendl. 100.  
Latch. 174.

Lord Brook against Lord Goring.

CASE 10.

UPON the Lord-Keeper's request, all the Justices and Barons were assembled for their resolution in the Case betwixt *Lord Brook* and *Lord Goring*, which was thus:

If the king grant an office by patent, or make a demise for years, the acceptance of a new patent in the one case, or of a new lease in the other, is no surrender of the first grant.

2 Roll. Abr. 496.  
1. Vent. 297.  
1. Bl. Rep. 112.  
5. Com. Dig. 514.  
1. Term Rep. 441.

*Queen Elizabeth*, in the nineteenth year of her reign, granted to *Fulk Grevill, esq.* the office of the clerk of the council of the marches of *Wales* for his life; and by another patent, 25. *Eliz.* granted to him the office of secretary there for his life; and in 1. *Jac.* 1. without recital of these patents, the said king grants the said offices to *Sir Fulk Grevill*, then knight, for his life: after, in 9. *Jac.* 1. the king, reciting the said patent of 1. *Jac.* 1, grants those offices to *Adam Newton* for his life, when, after the death, surrender, or forfeiture of the said *Sir Fulk Grevill*, they should become void: and after, in 14. *Jac.* 1. by another patent, reciting the patents of 1. and 9. *Jac.* 1. and omitting the grants 19. and 25. *Eliz.* the said king granted the said offices to *John Venor* and *John Mallet*, "HABENDUM for their lives, cum post mortem of the said *Fulk Grevill* or *Adam Newton*, surrender, forfeiture, or other determination, *vel alio quocunque modo* the said office should be void, or should come to the king's hand to dispose, with a *non obstante*, a *malè nominando*, or a *malè recitando prædicta officia, et non obstante malè recitando, malè nominando, vel non recitando, aliquod donum vel concessionem præantea factum de officiis prædictis*.

And, Whether the patent of 14. *Jac.* 1. be good or not? was the question?

It was argued several days, *viz.* by HEDLEY, *Serjeant*, against the patent 14. *Jac.* 1. and by NOY for the patent; and, at another day, by BANKS against the patent, and by FINCH, *Serjeant*, for the patent.

CRO. CAR.

O

And

LORD BROOK  
against  
LORD GORING.

And it was agreed by all the Justices and Barons, that the patent of 1. *Jac.* 1. was merely void: for, FIRST, it was agreed by the counsel of each side, that the patents of 19. and 25. *Eliz.* were good, and nothing objected against them: then *Sir Fulk Grevill*, being the patentee and alive, and he accepting a new patent in 1. *Jac.* 1. without reciting the former patents, and not any *non obstante* therein, it is clearly void; as it was agreed in *Harris v. Wings* (a), that if lessee for years of the queen take a new lease for years of the same thing, without recital of the former lease, it is merely a void lease, and no surrender of the former lease: and it is stronger in this case; for the grant of an office cannot be surrendered by the taking of a second grant, for there is not any revocation thereof.

(a) Moor, 415.  
3. Leon. 242.  
2. Roll. Rcp. 70.  
5. Co. 93.  
Cro. Eliz. 231.

Post. 259.

SECONDLY, It was agreed by all the Justices and Barons, that the patent of 9. *Jac.* 1. reciting the patent of 1. *Jac.* 1. as a good grant, which is void, and no *non obstante* therein, this grant is merely void.

Moor, 449.

THIRDLY, The principal question was, Whether the clauses of *non obstante* in the patent of 14. *Jac.* 1. makes it good? (for otherwise, without a *non obstante*, it was agreed by them all that it was void), because it recites the two patents which are void, and omits the recital of the two patents which are good, and makes the HABENDUM after the death or determination of the said patentees which are void: so the king is deceived in his grant, and misinformed; and, Whether the *non obstante* doth help it? was the principal question.

HYDE, *Chief Justice*, held clearly, as to that point, that the *non obstante* helps it and makes it a good patent, because the king relinquisheth the advantage of *non-recital* or *false recital*, and intends to grant it by whatsoever means the same shall become void.

4 Co. 35. b.

JONES seemed to doubt thereof, and would not deliver any opinion herein.

1 Rob. 229.

BUT RICHARDSON, *Chief Justice* of the common pleas, HUTTON, HARVEY, and DAMPORT, *Justices* of the common pleas, DENHAM, TREVOR, and VERNON, *Barons* of the exchequer, WHITLOCK, and MYSELF, *Justices* of the king's bench, conceived, that this patent of 14. *Jac.* 1. is merely void by reason of those misrecitals, which are not properly mis-recitals or false recitals, but rather false informations or suggestions whereby the king was deceived; for by intendment the king conceived those grants were good which are void, and granted those offices after the determination of the said grants, *vel alio quocunque modo, &c.*; so the king is deceived, and the *non obstante* shall not aid such false informations and false suggestions. 6. Co. 55. *Chandois Case*. 3. *Eliz.* *Dyer*, 197. *Blague's Case*. But there was not any certificate made of these Judges' opinions, because the parties compounded.

CASE II.

The King and Codrington against Rodman.

ON an excommunicato capiendo for a contempt of court, if the party does not shew that the writ issued for one of the causes mentioned in 5. *Eliz.* 23. the party shall be discharged.

EXCOMMUNICATO CAPIENDO upon a sentence in the delegates for costs in *castigatione morum*. The sentence being before the 21. *Jac.* 1. divers *capias* with proclamations and penalties

issued,



issued, according to the 5. *Eliz. c. 23.* The defendant, being now taken, pleaded, as to all the penalties and forfeitures, that it is not for any of the causes within the statute, therefore as to them he ought to be discharged.—And so it was held by ALL THE COURT.

THE KING and  
CODRINGTON  
against  
RODMAN.

Jones, 227.  
2. Roll. Ab. 178.  
3. Com Dig. 291.

a. Inst. 661. Lord Raym. 619. 817. Stra. 43. 76 946. 1076. Salk. 294. 3. As to the *excommunicato capiendo*, he pleaded, that the said offence and contempt for which the excommunication was awarded, was before 21. *Jac. 1.* and pleads the general pardon of 21. *Jac. 1.* in discharge thereof: and it was thereupon demurred—GERMYN, for the plaintiff, now moved, that this excommunication, being for costs taxed for the party, the party having interest in the costs being taxed (a) before the pardon, the general pardon shall not take away the costs:—which was agreed by THE COURT; for a private person being interested in them, the pardon shall not take them away.

If a contempt of the spiritual court be pardoned, the excommunication is thereby discharged.

(a) See Rex v. Chamberlain, 1. Term Rep. 103.

GERMYN then moved, that as the costs were not taken away, so no more is the excommunication, which is the means to enforce them to be paid; and it is an execution at the common law, and shall not be discharged.

GRIMSTON, for the defendant, moved, that this excommunication before the pardon is but for a contempt to the court, and all contempts are discharged, as contempts in chancery, star-chamber, and other courts, are discharged by the general pardon, not being excepted therein. 8. Co. 69. *Trollop's Case.*

If costs be awarded in the spiritual court, a pardon of the offence does not discharge the costs.

Ante, 9. 47.  
S. C. Jones, 227.  
2. Hen. 6. pl. 19.  
5. Co. 51.  
Plowd. 487.  
2. Roll. Ab. 178. 304.  
Cro. Jac. 212.  
Parker, 280.  
4. Burr. 2460.

And ALL THE COURT, *absente* HYDE, Chief Justice, conceived, that this excommunication is discharged by the pardon; and all contempts before the pardon are discharged, and all the sentences for the crime, except only the costs, for the payment of which he ought to have new process; but the Court would advise thereof.—Afterwards, in *Easter Term*, 7. Car. 1. being moved again, and a precedent shewn in court, of *Michaelmas Term*, 2. Car. 1. Roll 64. where it was adjudged to be discharged, it was so adjudged here likewise.

### Smart against Dr. Easdale.

CASE 12.

**A**CTION FOR WORDS: "Thou wast perjured; and hast much to answer for it before God."

Exception after verdict in arrest of judgment, For that it is not that he spake it *in auditu complurimorum*, or of any one, according to the usual form.

SECONDLY, That the words, "Thou wast perjured," is in the time past (a), and is extenuated by the subsequent words; *quasi diceret*, although not answerable before men, yet before God.

Sed non allocatur; for it is not material how long since it was spoken; the fault remains; and it being found by verdict that he spake them, it is not material although he doth not say *in auditu plurimorum*. Whereupon it was adjudged for the plaintiff.

"Thou wast perjured," is actionable; and if alledged to have been spoken in presentia, it shall be intended, after verdict, in auditu complurimorum. Post. 317.  
Cro Eliz. 486.  
Cro. Jac. 39.  
2 Lev. 193.  
1. Com. Dig. 195.

(a) See the case of *Carflake v. Mapledurham*, 2. Term Rep. 473.

## Michaelmas Term,

6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir James Whitlock, *Knt.*Sir George Croke, *Knt.*Sir Robert Heath, *Knt. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*} *Justices.*

## CASE 1.

## Memorandum.

The three last  
returns of *Mich.*  
Term adjourned.

THE three last returns, viz. *Octa. Quindena*, and *Tres Michael.* of this Term were adjourned by a writ of adjournment directed to the Justices of every court. And whereas it was my turn, being the *Puisne Judge*, to keep the *essoigns*, JUSTICE JONES, being at his house in *Holborn* for other business, went the first day of *Octa. Michaelis* to *Westminster*, and before him the writ was read of adjournment of all the said returns, and he adjourned the Term for the king's bench; and JUSTICE DAMPORT, *Puisne Judge* of the common pleas, adjourned the Term in the common pleas; and BARON VERNON, in the exchequer.

The *Puisne*  
Judges of the  
several courts  
keep the *essoigns*;  
and the Court  
does not sit till  
the *quarto die*  
*post.*

And the day of *essoigns* of *Mense Mich.* being 27th of *October*, I kept the *essoigns* for the king's bench, and JUSTICE DAMPORT for the common pleas, and BARON SOTHERTON for the exchequer, and did no more the same day; and none of the Justices of the king's bench or common pleas sat, nor THE LORD KEEPER in the chancery, until *quarto die post*, which was *die Sabbat. 30. Octob.*

Ante, 14. 102.

Dyer, 225. b. Cro. Jac. 17.

The lord mayor  
to be sworn in  
on the morrow  
of *St. Simon and*  
*St. Jude.*

And because the mayor of *London* was to be sworn in the exchequer by ancient usage *crastino post Festum Sanctorum Simonis et Jude*, the Lord Treasurer and Barons of the exchequer sat in the exchequer 29 *Octob.* and there the mayor was sworn; but no great feast for the mayor, according to the ancient usage, was kept, the plague being in *London*, and great scarcity of corn that year; for which causes, by proclamation, the feasts of the companies of *London* were prohibited.

The feasts of  
the companies  
of *London* on  
lord mayor's  
day prohibited

by proclamation on account of the plague and scarcity of corn.

## CASE 2.

## Hulm against Heylock.

Ante, fol. 129.

A. devises lands  
to B. an infant,  
in fee. The  
heir of the de-  
visor enters and  
levies a fine.  
B. dies within  
age, leaving a  
sister married.  
The sister must  
make her claim  
within five years  
after the death

EJECTMENT upon a lease made by *Henry Green* of land in *Old-street*. Upon evidence at the bar the Case was, *John Metcalf*, seized of the land in question, deviseth it to *John Gallant*, an infant of the age of three years, in fee, by the name of his tenement called THE WHITE SWAN, and dies. *Henry Metcalf*, the son and heir of *John Metcalf*, enters and levies a fine thereof in *decimo sexto Jacobi*, with proclamations, in the life of *John Gallant*, being within age; who after dies, being within age, the wife of *Heylock* being his sister and heir.

of her husband, or she will be bound by the fine. Ante, 110. Post. 557.—Co. Lit. 240. b. Owen, 141. 1. Leon. 209. Cruise, 146. 198. 3. Com Dig. 356. 6. Mod. 67.

The

The question was moved by GERMYN, that this fine, although five years passed without claim, shall not hurt the said Heylock's wife (especially being she was a *feme covert*), because she claimed by a devise, and before entry the fine is levied, so as her estate was not turned into a right; as it hath been resolved, that if one enters after a devise before the devisee enters, and dies seised, that descent shall not take away the entry: so that fine and non-claim shall not bar where it is not turned into a right.

HULM  
against  
HEYLOCK.

Cro. Eliz. 219.  
1. Leon. 211.

But ALL THE COURT conceived, although a descent in that case shall not bind, for then they might not maintain any action, never having had any seisin, and so they should be without remedy, where there is only a descent and no binding matter of bar; yet a fine and non-claim, which is a binding in law, shall bar the husband (who suffered the five years to pass), and all claiming under him, and the wife herself during the coverture, but the wife shall have new five years after the death of the husband. And so they delivered the law to be to the jury.

8. Co. 72. b.  
Co. Lit. 326. a.  
Ante, 157.  
Cowp. 622.

## Anonymous.

CASE 3.

**I**NDICTMENT of forcible entry in tithes, where the party *ousted* prays restitution. The question was, Whether this indictment were maintainable? for it was agreed, that an assize lies of tithes by the 32. Hen. 8. c. 7. and they be recoverable as a law inheritance.

An assize, and also an indictment of forcible entry, will lie for tithes.  
Post. 486.

CALTHROP moved, that the indictment should be allowed as well for tithes as for rent; and for rent it appears that forcible entry lies by Fitzh. Nat. Brev. 249. b. 20. Hen. 6. pl. 11. & 22. Hen. 6. pl. 23.

20 Hen. 6. pl. 14.  
22. Hen. 6. pl. 33.  
Bro. Force, 7.  
Cro. Jac. 18.  
1. Hawk. P. C. 282.

And afterward, *absente* HYDE, a writ of restitution was granted.

Id. Raym. 610. Salk. 260. 8. Mod. 65. 12. Mod. 268.

## Levanne's Case.

CASE 4.

**S**AMUEL LEVANNE, administrator of *Mary Levanne*, his sister, was sued in the spiritual court in London before the ordinary to make distribution of the goods of the intestate, pretending all the debts of the intestate and all legacies were discharged, and a great surplus remaining, which was disposable at the pleasure of the ordinary, and to be divided among the friends of the intestate.

After the ordinary has granted administration of an intestate's effects, he cannot intermeddle to compel distribution of the surplusage.

BANKS, the Prince's Attorney for this cause, moved for a prohibition; for by the 30. Edw. 3. c. 11. and 21. Hen. 8. c. 5. administration is appointed to be committed to the nearest and faithfulest friends; which being committed, the ordinary hath no authority to meddle with him to make distribution; for he is an executor to sue and to be sued, and to dispose of the goods of the intestate as freely as an executor might where there is a testament. And it would be an inconvenience to compel him to make distribution; for if afterwards other debts should be discovered, or if he be sued for breach of covenants, the administrator should be compelled to answer of his own goods; and therefore it is reason he should keep the intestate's goods to save himself harmless against such suits.

Vide ante, 62.  
Meor, 864.  
Hob. 83. 191.  
Carter, 125.  
1. Lev. 233.  
Jones, 228.  
Palm. 527.  
Allen, 56.  
1. Com. Dig. 252.  
4. Com. Dig. 512.

GERMYN, for the plaintiff in the spiritual court, moved, that no prohibition should be granted; for it is reason, when there is surplus (it



LEVANNE'S  
CASE.

(it being averred that all legacies and debts are satisfied), that the administrator should not retain them to his own use, but that they should be distributed amongst the friends of the intestate; and the ordinary will take security, that if debts be discovered afterwards, there shall be restitution of the goods to the administrator as much as will satisfy.

Ante, 62.  
Hob. 83.  
Moor, 864.  
R. 37. 640.

But ALL THE COURT resolved, that a prohibition was well grantable, because the absolute interest in the goods is in the administrator; and the administration being committed, the ordinary hath nothing to do, and he cannot now, as he might at the common law, repeal the administration committed at his pleasure; and it shall not be left to his discretion to provide restitution for debts discovered, for that might be inconvenient. Whereupon a prohibition was granted (a).

(a) This Case is now provided for by the statute of Distributions, 22 & 23. Car. 2. c. 10. but this act does not extend to a *feme covert* intestate. See the 29. Car. 2. c. 3.

## CASE 5.

## Pilchard against Kingston.

A declaration in *assumpsit* on a promise that if *A.* marry *B.* and make her such a jointure, the defendant would make good to him her fortune of 600*l*. need not shew that the wife was not possessed of so much money—See 29. Car. 2. c. 3.

**A**SSUMPSIT. Whereas the defendant, having communication with the plaintiff for the marriage of one *Margery*, affirmed that her portion was six hundred pounds; the defendant, in consideration that he would marry the said *Margery*, and assume that such land should be assured to her for her jointure, promised the plaintiff that he would pay to him one hundred pounds, *et firmam faceret* to him the said portion of six hundred pounds; that he, at the request of the defendant, espoused the said *Margery*, and does not say he had assured such land to her for her jointure; and that the defendant had not paid the hundred pounds, *nec firmam faceret* to him the said portion of six hundred pounds.

The defendant pleaded "*non assumpsit*;" which was found for the plaintiff.

GRIMSTON moved, in arrest of judgment, that the declaration was not good, because the plaintiff hath not shewn that he might not have the said portion, or that the said *Margery* had not such a portion; for it may be the said *Margery* had such a portion in her own hands or in good debts, and the defendant did not promise to pay but to *make good* the portion, which is performed if she hath such a portion, and therefore the plaintiff ought to shew what he wants thereof. And such allegation, that he *firmam faceret portionem*, is not good.

But ALL THE COURT held, that the declaration was good enough; for it pursues the words of the *assumpsit* in the breach alledged, and these words *tantamount* that he would warrant that he should have such a portion with his wife. And he pleads "*non assumpsit*," and the jury found damages; which intends that they gave damages for so much as was wanting according to their evidence. Whereupon it was adjudged for the plaintiff (b).

(b) This judgment was afterwards affirmed in the exchequer chamber on a writ of error.—2. Roll. Abr. 738.

## CASE 6.

## Downs against Winterflood.

The statute 21. Jac. 1. c. 13. which amends records after verdict for error in misnaming any of the jurors, &c. does not extend to amend a mistake in the christian name. Post. 563.—Cro. Jac. 28. 5. Co. 42. 1. Bac. Abr. 93. 3. Bac. Abr. 276.

**A**TTAINT. One of the jurors was returned by the name of *Alexander Prescott*; but in the *re-summmons*, which was in nature after verdict for error in misnaming any of the jurors, &c. does not extend to amend a mistake in the christian name. Post. 563.—Cro. Jac. 28. 5. Co. 42. 1. Bac. Abr. 93. 3. Bac. Abr. 276.

of a *distringas*, it was *Alexandrus Prescott*, and he was sworn by that name; and the verdict of *the petit jury* was affirmed by them.

It was moved in arrest of judgment, that this was tried by a wrong person, and therefore the verdict ill, and not aided by any statute.

But the sheriff and the said juror being examined in court, it appeared, that *Alexander Prescott* was his true name, and that he was the juror intended to be returned and truly sworn, and that there was not any known by the name of *Alexandrus Prescott* in the same town. Dougl. 114.

The question was, If it should be amended, as the misprision of the clerk, by the 21. Jac. I. c. 13.?

And IT WAS CLEARLY RESOLVED, that it is not to be aided by the 21. Jac. I. c. 13. for that statute extends only to the *surnames* of the jurors, or where their *additions* are mistaken; in which cases if by examination it may appear that he is the same person intended to be returned, the statute aids that, but not where a *christian name* is mistaken.

For staying the amendment, the counsel relied upon the case of *Galdwell v. Parker* (a), where *Palus Cheak* was returned in the *venire*, and the *distringas* was *Paulus Cheak*, which was his true name, yet it cannot be amended; and the record thereof, which was in *Michaelmas Term*, 33. & 34. Eliz. Roll 419. was shewn in court, where it appears, that for this cause the verdict was quashed, and a *venire facias de novo* awarded.—BUT NOTE, The misprision was in the return of the *venire facias*, which was the first process and return; but here in the second, which ought to be guided by the former process.—Wherefore THE COURT doubted thereof. *Et adjournatur*.

(a) 5. Co. 42.

### Memorandum.

CASE 7.

THE eighteenth of November 1630, in this Term, JOHN WALTER, knight, the Chief Baron, died at *Serjeants-Inn*, being a profound learned man, and of great integrity and courage, who being Lord Chief Baron by patent, 1. Car. 1. *quamdiu se bene gesserit*, being in the king's displeasure, and commanded that he should forbear the exercising of his judicial place in court, never exercised his place in court, from the beginning of *Michaelmas Term*, 5. Car. 1. until this day; and because he had that office *quamdiu se bene gesserit*, he would not leave his place, nor surrender his patent, without a *scire facias*, to shew what cause there was to determine his patent, or to forfeit it; so that he continued Chief Baron until the day of his death. But it appears that the Judges of both benches are made only *durante bene placito regis*, so as they are determinable at the king's pleasure (a). The death of CH. B. WALTER, who being appointed *quamdiu bene se gesserit*, would not resign upon the king's command.

(a) See now 12. & 13. Will. 3.

and 1. Geo. 3. c. 23. 2. Hawk P. C. 4, 5.

### Aquila Weeks' Case.

CASE 8.

AQUILA WEEKS, keeper of the Gatehouse, was sued in an action on the case, for suffering J. S. to escape, who was in execution upon a judgment in *Trinity Term*, 2. Car. 1. He pleaded the judgment to be of one Term, and in the *nisi prius* roll it be entered of another Term, a *venire de novo* shall issue, although the misrecital was by misprision. Palm. 378. Godb 328.

not

AQUILA  
WEEKS' CASE.

Cowp. 407 841.  
1. Term Rep.  
782.  
2. Term Rep.  
747.

not guilty in *London*; and it was found by *nisi prius*: and because the record of the *nisi prius* mentions the judgment to be in *Trinity Term*, 3. Car. 1. which was a misprision of the record, the plaintiff was nonsuited. And now it was moved by GERMYN, for the plaintiff, that by reason of this misprision the record of the *nisi prius* is not warranted by the roll, and the nonsuit thereupon being null the *postea* shall not be recorded nor entered; for there is no warrant for this record of *nisi prius*. Wherefore it was prayed that a *distingas de novo* might be awarded: and upon the shewing of two precedents in this court, a *distingas de novo* was awarded.

## CASE 9.

## Crowle against Dawson.

If a man covenant that the woman he is about to marry shall quietly enjoy all her goods, and after the marriage he takes the goods and detains them, it is a breach of the covenant.

1. Wood's Convey. ch. 5. f. 8.  
5th edit. by Mr. Powel.  
Cowp. 125.  
Dougl. 43.  
1. Term Rep. 671.

**D**EBT upon an obligation conditioned, That whereas the defendant should marry such a widow, who was possessed of divers goods, which were her first husband's, and the goods of his children, that her husband should not meddle with them, but that she and her children might enjoy them without disturbance, claim, or interruption of the defendant, or any claiming by him:

The defendant pleads performance of the covenants and agreements generally.

The plaintiff assigns for breach, That the said first husband was possessed of such sheep and goods, and that the wife had them before marriage, and that such a day after the marriage the defendant, her now husband, took the said goods into his hands, and them detained, and yet detains: and issue thereupon; and found for the plaintiff.

And moved in arrest of judgment, That this is no sufficient breach, for he doth not shew that the husband made any act or disturbance; for by the intermarriage the goods are in the husband; and it is not shewn that he disturbed the wife to enjoy them.

HYDE and JONES, *Justices*, were of that opinion.

But JUSTICE WHITLOCK and MYSELF conceived otherwise, and that the breach is well assigned; for by the allegation that he took the said goods into his hands and detained them, is supposed, if not a forcible yet at least, a taking and detaining of them from the wife. And issue being joined, and found for the plaintiff, the Court intends not but that it was an unjust *caption* and *detention* contrary to the agreement: and afterwards HYDE, *mutata opinione*, upon the reading of THE BOOKS, was of the same opinion. Whereupon, *absente* JONES, it was adjudged for the plaintiff.

## CASE 10.

## King against Lorde.

Hilary Term, 5. Car. 1. Roll 795.

If a copyholder for life surrender to the lord generally, who grants it for life, and after admission the grantee dies, the surrenderor cannot be admitted again

1 Roll. Ab. 504.

442. 582. Co. Cop. 108, 109. Ld. Raym. 44.

**E**JECTMENT of a lease of *Lady Pagett's*. Upon a special verdict the case was, *Lettice Knowls*, copyholder for life, surrenders, in consideration of twenty pounds, to the use of one *Dorothy Whistler*. The lord accepts the surrender, and grants it to *Dorothy Whistler* for her life, who was admitted accordingly, and dies. *Lettice Knowls* being alive, claiming it as her former estate, lets it to the defendant, and the lord enters, and lets to the plaintiff.

to the estate, but the lord shall have it. *Sed aliter* a copyholder in fee. Jones, 229. 2 Roll. Abr. 462. Popham, 39. *Sed vide* Giib. Ten. 255. 257. Cro. Eliz. 361. 442. 582. Co. Cop. 108, 109. Ld. Raym. 44.

WHISTLER,



WHISTLER, for the defendant, argued, that when a copyholder for life surrenders to the use of another, who is admitted, the first copyholder hath *quasi* a possibility or remainder of an estate, that if he survive him to whose use the surrender is made, that he shall have it again. But he agreed, that if a copyholder for life surrender his estate, to the intent that the lord should grant it to whomsoever he pleased, then his estate was drowned, but not here : and for that he relied upon the book 9. *Eliz. Dyer*, 264.

But ALL THE COURT conceived she may not have it again, but that her estate is merely determined by the surrender, and that there is no difference as to that purpose, to surrender all her estate to the use of one, and to surrender generally; and the book of 9. *Eliz. Dyer*, 264. doth not warrant such a difference. For if a tenant for life surrender to the use of another, and the lord grants it, he is merely in by the lord, and not by the copyholder who surrendered; but if a copyholder in fee surrender to the use of another for life who is admitted, he is in *quasi* by the copyholder, and by his death the copyholder shall have it again, but not here. Whereupon it was adjudged for the plaintiff.

NOTE, This judgment was impeached by a writ of error, and the matter in law assigned for error. And by ALL THE JUSTICES of the common pleas AND BARONS of the exchequer, the judgment was affirmed.

KING  
against  
LORDS.

1. Salk 188.  
1. Mod 200.  
6. Mod. 68.  
1. Atk 11.  
2. Com. Dig.  
500.  
Co. Lit 59. b.  
note (2).

1. Term Rep.  
600.  
2. Term Rep.  
198.

### The Lord Savill's Case.

CASE 11.

SIR THOMAS SAVILL was sued in the common pleas in trespass of assault, battery, and wounding; and found for the plaintiff, and damages assessed to three thousand pounds; and judgment being there for the plaintiff, error was brought and assigned: but upon examination of the record, there was no material error; whereupon judgment was affirmed by the rule of the Court. But before entry of the judgment Sir Thomas Savill procured a writ out of the chancery, directed to the Justices of the king's bench, *et quibuscunque interesset*, wherein he shews to the Court, that Sir John Savill his father was created baron for his life, and after the barony was limited to the said Sir Thomas Savill, being his youngest son, and to the heirs males of his body: and the writ recites, that he is a peer of the parliament; and therefore the writ commands, that no other process shall be awarded against him but what shall be awarded against a peer of the realm.

If judgment be obtained against a defendant in trespass of assault, and he becomes a peer, *Quare*, What execution shall issue?

7. Co. 34.  
9. Co. 49.  
12. Co. 96.  
2. Bl. Rep. 788.  
Strange, 743.  
Salk. 512.  
Ld. Raym 1214.  
1442.  
Douglas, 45.

BANKS moved, that this writ should be recorded, and offered a plea comprising such matter, and that after the last continuance, and before this Term, Sir John Savill, the father of Sir Thomas Savill, was created baron for his life, and that after his death the said Sir Thomas Savill, who was his younger son, should be a baron: and the plea shews, that Sir Thomas Savill, LORD SAVILL, died in September last, which was before *Octabis Michaelis*; and that the said Sir Thomas Savill mentioned in the patent, and the said Sir Thomas Savill mentioned in the record, *est una et eadem persona*; and concludes his plea, and prays, that no process of execution might be awarded against him but what ought to be against a peer of the realm:

**LORD SAVILL'S CASE.** realm: and the writ was read in court, being the same which is in **THE REGISTER** (a); which is, where one is sued in the common pleas in a personal action, and process of outlawry, a writ is sued out of the chancery, reciting, that he is a peer of the realm, and appoints, that no other process shall be awarded against him than such as shall be against a peer.

**THE COURT** appointed the writ to be recorded; but for the plea, because there never was such a precedent, and that he is not defendant in the action, as it is in the said case in **THE REGISTER**; for he is plaintiff in the writ of error, and hath no day to plead; the plea was rejected; and the judgment being affirmed, they would advise what execution should be.

(a) Folio, 287. and Natura Brevium, 247. c.

# Hilary Term,

## 6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

### Drake against Munday.

Case 1.

**D**EBT by the plaintiff as executor to one *Drake*. Upon demurrer the case was, By articles indented betwixt the testator and the defendant, it was "COVENANTED, granted, and agreed, and the testator covenants, grants, and agrees with the defendant, that he shall have and enjoy such a house and lands for six years, and that the testator will sufficiently repair the house. *Et in consideratione præmissorum*, it is covenanted, granted, and agreed betwixt the said parties, and the defendant covenants, grants, and agrees for him, his heirs, executors, and assigns, to pay to the testator, his heirs, executors, and assigns, an annual rent of ninety pounds during the said six years, at the Feast of *Annunciation* and *St. Michael*." Upon this the defendant entered, and the testator died; and for ninety pounds arrear for one year after his death the executor brings the action, and declares upon all this matter. And thereupon the defendant demurs.

**HENDEN**, *Serjeant, for the plaintiff*, argued, that this is merely in covenant, and shall not enure as a rent by way of reservation; and if it be a covenant, it is due to the executor; and if it be a reservation, it follows the reversion, and goes to the heir, and not to the executor: and he moved, that so it appears to be the intent of the parties, that it should be only as a covenant, and as a sum in gross, otherwise the words of the covenant were idle; and he relied upon the 10. *Eliz. Dyer*, 272, 5. b. And the rather it is a covenant, for that *ratione præmissorum* he covenants, which refers to more than the covenant, to enjoy the lands, &c.

But ALL THE COURT conceived, that it is merely a rent, and enures the reversion, and shall go to the heir; for as the words of the covenant and grant, that "he shall enjoy the land for six years," amount to a lease, and shall bind the heir, so the words of the covenant and grant of the lessee, that "he shall pay such a rent annually," amount to a reservation; and the rather, because he covenants and grants to pay him and his heirs (a). Whereupon rule was given, that judgment should be entered for the defendant; *et quod querens nihil capiat per billam*, unless cause were shewn to the contrary: and afterwards being moved again, it was adjudged accordingly.

(a) *Vide* *Browning v. Beeston*, *Plowd.* the 1. *Edw. 6.* and *Brook's Abr.* "Lea-  
31. the Year-Books 21. Hen 7. pl. 36. "ses," pl. 21.

Beaumont

If a person co-  
venants, grants,  
and agrees, that  
another shall  
have and enjoy  
such a house for  
a certain time,  
and the other  
agrees to pay a  
sum annually,  
it amounts to  
a lease with a  
reservation of  
rent.

Jones, 231.  
Cro Jac. 34. 42.  
92. 172. 439.  
500. 659.  
Hob. 35.  
1. Roll. Ab. 847.  
Co. Lit. 47.  
Moor, 861.  
Noy, 14.  
Palmer, 201.  
Leon. 118.  
3. B. 2. 252.  
2. Brownl. 23.  
Roll Rep. 397.  
Wood's Convey.  
403.  
Gilb. Cov. 26.  
2. Mod. 80.  
Shep. Touch.  
270.  
3. Bac. Abr. 420.  
3. Com Dig.  
248.  
Doug. 27.  
1. Term Rep.  
735.  
2. Term Rep.  
739.



## CASE 2.

## Beamond against Long.

If **BARON** and *feme executrix* recover, and the *feme* die before execution, the **BARON** shall not have *scire facias*. *Sed aliter* if for a debt due to the *feme*, and not in *autre droit*.

Post. 227. 464.

2. Keb. 668.

1. Sid. 29. 337.

3. Mod. 179.

3. Mod. 186. 190.

6. Mod. 179.

Cro. Jac. 323.

Carth. 475.

2. Ld. Ray.

1050.

2. Crom. Pract.

06.

Dougl. 637.

**UPON** demurrer the case was, Husband and wife, the wife, being administratrix to her former husband, brings debt upon a bond of two hundred pounds due to the intestate, and had judgment to recover the debt, their damages and costs. The wife afterwards dies, and a year and a day being passed, the husband brings a *scire facias* to have execution. Whereupon it was demurred.

And **ALL THE COURT**, except **HYDE**, *Chief Justice*, who doubted thereof, conceived, that this *scire facias* lies not for the husband, because, being a debt demanded by the wife as administratrix, it is in *autre droit*; and although they recover, yet she dying before execution, the duty remains to him who takes new administration as in right of the intestate: and although the husband is party to the judgment, yet he hath no property in the debt; and he who ought to have the *scire facias*, must have privity and property to have the debt, otherwise it is a vain suit (a). But if husband and wife bring an action of debt, for debt due to the wife, and recover, the wife dies, the husband may bring a *scire facias* to execute this judgment; for the debt being recovered, the husband after the death of the wife shall have it, but not in the principal case. *Residuum postea*, page 227. 458. 464.

(a) By 17. Car. 2. c. 8. administrator c. 3. the husband of a *feme covert* shall *de bonis non* may sue a *scire facias* upon a have administration. judgment in *autre droit*.—By 29. Car. 1.

## CASE 3.

## Stroud against Hoskins.

The suggestion ordained by

2. *Edw.* 6. c. 13.

upon suing *prohibition*, must be

proved by wit-

nesses where it

is matter of fact;

but if a *consulta-*

*tion* be awarded

for that *de A.*

another *prohibition*

may be

granted.

Dyer, 170.

Jones, 251.

Yelv. 102. 119.

2. Show 92.

Carth. 463.

Salk. 354.

2. Inst. 662.

Cro. Eliz. 736.

Moor, 917.

2. Vent. 47.

Pop. 159.

Hob. 286.

4. Com. Dig.

515. 518.

4. Bac. Abr.

246. 249.

Cowp. 424.

**PROHIBITION** upon the 2. *Edw.* 6. c. 13. Because he sues for tithes of heath and barren ground within seven years after the improvement. The defendant pleads the 50. *Edw.* 3. c. 4. and that at another time a prohibition was granted, and consultation thereupon, therefore he shall not now have another prohibition. It was shewn that the consultation was not upon the substance of the prohibition, but because he did not prove by two witnesses the suggestion within the six months. And it was thereupon demurred.

**THE FIRST QUESTION** was, Whether by the statute the suggestion ought to be proved by witnesses?—And **IT WAS RESOLVED**, that it ought, because it is a mere matter in fact; and the suggestion ought to be proved by the intention of the statute, as well as a prescription *de modo decimandi*, or a discharge of tithes, or any other such suggestion.

**SECONDLY**, It was resolved, that the consultation being granted for not proving the suggestion by two witnesses, according to the 2. *Edw.* 6. c. 13. and not upon the substance of the suggestion for want of its verity, or for the insufficiency thereof, it is not within the 50. *Edw.* 3. c. 4.; for that is intended where consultation is granted upon the substance of the suggestion being proved to be insufficient in verdict or nonsuit after evidence, and not where it is granted for the insufficiency of the form of the suggestion, or in the proceeding thereupon. Wherefore it was adjudged for the plaintiff, especially as this case is, for that it is a collateral cause out of the suggestion, and no cause of consultation at the time of the statute made.

Sir

## Sir William Courtney against Sir Richard Greenville, Knight.

CASE 4.

**E**RROR to reverse a judgment in the common pleas in debt. The plaintiff declared, That the defendant, 18. May, 4. Car. 1. acknowledged himself bound to the said Sir Richard Greenville in two hundred and eighty pounds *solvendum* upon request, *et profert hic in curia scriptum prædictum quod debitum prædictum in formâ prædictâ testatur, cujus dat. est eisdem die et anno.*

The defendant demands *OVER conditionis scripti obligatorii prædicti*; which being read, he pleads payment.

And issue was joined thereupon; and judgment given for the plaintiff.

The error assigned was, Because he doth not declare according to the usual course, *quod per scriptum obligatorium concessit*, nor any writing mentioned in the former part of the declaration: so it doth not appear to the Court that there was any writing obligatory; and that being faulty in substance, no plea or verdict may make it good.

But ALL THE COURT were of opinion, because he shewed the writing, whereby he demands the debt, and the defendant by his plea shews that it is an obligation with a condition, and issue is taken thereupon, and found for the plaintiff, that the declaration is good enough; at least it appears to the Court, that the plaintiff hath a just debt, and good cause to recover. Wherefore the judgment is good, and was affirmed.

In debt on bond, the omission of *per scriptum obligatorium* is aided after *oyer* by a plea "*quod solvit*"; and verdict for the plaintiff.  
Post. 238. 363.  
18. Edw. 4. pl. 8.  
8. Hen. 7. pl. 71.  
1. Co. 45.  
7. Co. 25. a.  
8. Co. 133. b.  
3. Lev. 234.  
Cro. Eliz. 737.  
Cro. Jac. 420.  
Lut. 1667.  
6. Mod. 306.  
Salk. 463.  
Co. Lit. 303. b.  
5. Com. Dig. 59. 244.

## Gray against Fielder.

CASE 5.

**D**EBT on a bond assigned by commissioners of bankrupts, and doth not shew the obligation; wherefore it was demurred.— But because he comes in by act in law, and hath no means to obtain the obligation, IT WAS ADJUDGED to be good enough, without shewing it in court; as tenant by statute merchant, or tenant in dower, shall have advantage of a rent-charge without shewing the deed.

10. Co. 94. Cro. Jac. 109. Co. Lit. 225. 3. Will. 3. Dougl. 4. note (1). 1. Term Rep. 149.  
And see 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16. Post. 447.

5. Co. 75.  
1. Term Rep. 149.

## The Case of Sir Miles Hobert and William Stroud, Esq.

CASE 6.

**T**HE ATTORNEY-GENERAL exhibited two several informations, the one against William Stroud, Esq. the other against Sir Miles Hobert, knight. The charge against both of them therein was for several escapes out of the prison of the Gatehouse.— They both pleaded not guilty, and their cases appeared to be as follow:

The said William Stroud and Sir Miles Hobert were, by the king's command, committed to prison for misdemeanor alleged against them in their carriage in the house of commons at the last parliament. They may be indicted for the misdemeanour, although he had the gaoler's permission. Post. 181.

Every place where a person is restrained of his liberty is a prison; but if a person be committed to a particular place, and instead of confinement within the walls goes at large, he  
251. Ante. 14.

ment.

SIR MILES  
HOBERT and  
WILLIAM  
STROUD'S CASE

1. Roll. Ab 808.  
Hobart, 202.  
3. Co. 44. a.  
Moor, 257. 299.  
1. Mod. 116.  
Hard. 476.  
2. Hawk. P. C.  
189, 190, 191.  
3. Com. Dig.  
379. 384.

ment. Afterwards, in *Trinity Term*, 6. Car. 1. both of them being by order of this court, and by a warrant from the attorney-general, to be removed to the Gatehouse, the warden of the *Marshalsea* (where they were before imprisoned) sent the said *Stroud* to the keeper of the Gatehouse, who received him into his house, lately built, and adjoining to the prison of the Gatehouse; but being no part thereof: after which receipt the same night he licensed the said *Stroud* to go with his keeper to his chamber in *Gray's-Inn*, and there to reside. *Sir Miles Hobert* was also by the said warden of the *Marshalsea* delivered to the keeper of the Gatehouse; but being sick and abiding at his chamber in *Fleet-street*, he could not be removed to the prison of the Gatehouse, but there continued with his keeper also. Afterwards the sickness increasing in *London*, they (with the licence of the keeper of the Gatehouse, as it was proved) retired with their under-keepers to their several houses in the country for the space of six weeks, until *Michaelmas Term* then next following, when, by direction of the said keeper, they returned to his house. But in all that space it could not be proved that they ever were in any part of the old prison of the Gatehouse, but in the new building thereto adjoining, unless when they once withdrew themselves to a close-stool which was placed near to the parlour, and was part of the old prison of the Gatehouse. This evidence was given to both the said juries, and both of them returned their verdicts severally, that they were *not guilty* according to the informations exhibited against them.

And in this case it was debated at the bar and bench, Whether by this their receipt and continuance in the new house only, it may be said that they ever had been imprisoned?

And THE JUDGES HELD, that their voluntary retirement to the close-stool made them to be prisoners. They resolved, that in this and all other cases, although a prisoner departs from prison with his keeper's licence, yet it is an offence as well punishable in the prisoner as in the keeper. And CALTHROP made this difference betwixt breach of prison and escape: the first is against the gaoler's will, the other is with his consent, but in both the prisoner is punishable: whereunto THE WHOLE COURT agreed.

IT WAS ALSO RESOLVED, that the prison of the king's bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison.

The court of king's bench may, by rule of court appoint the prison of the Court to be in any part of England. Post. 466.—1. Roll. Abr. 810. *Strange*, 678. 817. 843. See 27. Geo. 2. c. 37. For the present boundaries of the rules of the king's bench prison, see 3. Term Rep. 583, 584.



## Easter Term,

7. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

} *Justices.*  
}

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Memorandum.

CASE 1.

IN this Term SIR GEORGE VERNON, one of the Barons of the Exchequer, was made *Puisne Justice* of the common pleas, in place of SIR HUMPHREY DAVENPORT, who was made Chief Baron of the exchequer in *Hilary Term* last past; and JAMES WESTON, of the *Inner Temple*, was, by writ returnable *mensæ Paschæ*, made a Serjeant, he appearing in chancery *quarto die post* of the return, being *Thursday*; and the *Monday* following, before all the Justices of the king's bench and common pleas and Barons of the exchequer (none being absent), assembled at *Serjeant's-Inn*, in *Fleet-street*, performed the solemnity, reciting his count, and his robes were there put on; and he made his feast in *Serjeant's-Inn* for the Justices and Serjeants and the king's learned Counsel, and gave rings, according to the usual manner, afterward, with this inscription, "*Servus Regi, serviens Legi*;" and within two days he was made one of the barons of the exchequer.

Mr. Baron Vernon made *Puisne Judge* of common pleas; and Mr. Justice Davenport made, Chief Baron.—Mr. Serjeant Weston called.

### Flowers' Case.

CASE 2.

ACTION UPON THE CASE. Whereas she was a midwife, and had used that art for divers years, and by that means gained much maintenance for herself and family; that the defendant, having communication of her and her profession, spake these words of the plaintiff, "Many have perished for her want of skill."—And after verdict, being moved in arrest of judgment, that these words were not actionable, it was adjudged for the plaintiff, for she hath a profitable gain by that function; and therefore these words may be prejudicial.

An action lies for saying of a midwife, "many have perished for her want of skill." *Hutley, 71. Cro. Jac. 504. 1. d. Ray. 1480. Cowp. 276. 1. Term Rep. 100.*

*Helier against Hundred de Benhurst.*

CASE 3.

*Easter Term, 6. Car. 1. Roll 233. Berks.*

ACTION upon the statute of *Winton*, 13. *Edw. 1. ft. 2. ch. 1.* The examination for that he was robbed of seventy pounds, and made hue and cry, and amends was not made, nor any of the robbers taken: and counts upon the statute of *Winton*, and that he took his oath before and cry, may be taken by a justice of the county, though he is not in the county at the time of taking it, for it is a ministerial act. *Jones, 239. 1. Roll. Abr. 538. Leon. 322. Sid. 209. Bull. N.P. 186. 3. Com. Dig. 477. Dougl. 465.*

The examination upon oath required by the 27. *Edw. c. 18.* in case of hue and cry at the time of taking

*John*

SIR MILES  
HOBERT and  
WILLIAM  
STROUD'S CASE

1. Roll. Ab 808.  
Hobart, 202.  
3. Co. 44. a.  
Moor, 257. 299.  
1. Mod. 116.  
Hard. 476.  
2. Hawk. P. C.  
189, 190, 191.  
3. Com. Dig.  
379. 184.

ment. Afterwards, in *Trinity Term*, 6. Car. 1. both of them being by order of this court, and by a warrant from the attorney-general, to be removed to the Gatehouse, the warden of the *Marshalsea* (where they were before imprisoned) sent the said *Stroud* to the keeper of the Gatehouse, who received him into his house, lately built, and adjoining to the prison of the Gatehouse, but being no part thereof: after which receipt the same night he licensed the said *Stroud* to go with his keeper to his chamber in *Gray's-Inn*, and there to reside. Sir *Miles Hobert* was also by the said warden of the *Marshalsea* delivered to the keeper of the Gatehouse; but being sick and abiding at his chamber in *Fleet-street*, he could not be removed to the prison of the Gatehouse, but there continued with his keeper also. Afterwards the sickness increasing in *London*, they (with the licence of the keeper of the Gatehouse, as it was proved) retired with their under-keepers to their several houses in the country for the space of six weeks, until *Michaelmas Term* then next following, when, by direction of the said keeper, they returned to his house. But in all that space it could not be proved that they ever were in any part of the old prison of the Gatehouse, but in the new building thereto adjoining, unless when they once withdrew themselves to a close-stool which was placed near to the parlour, and was part of the old prison of the Gatehouse. This evidence was given to both the said juries, and both of them returned their verdicts severally, that they were *not guilty* according to the informations exhibited against them.

And in this case it was debated at the bar and bench, Whether by this their receipt and continuance in the new house only, it may be said that they ever had been imprisoned?

And THE JUDGES HELD, that their voluntary retirement to the close-stool made them to be prisoners. They resolved, that in this and all other cases, although a prisoner departs from prison with his keeper's licence, yet it is an offence as well punishable in the prisoner as in the keeper. And CALTHROP made this difference betwixt breach of prison and escape: the first is against the gaoler's will, the other is with his consent, but in both the prisoner is punishable: whereunto THE WHOLE COURT agreed.

IT WAS ALSO RESOLVED, that the prison of the king's bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison.

The court of king's bench may, by rule of court appoint the prison of the Court to be in any part of England. Post. 466.—1. Roll. Abr. 810. Strange, 678. 817. 843. See 27. Geo. 2. c. 17. For the present

boundaries of the rules of the king's bench prison, see 3. Term Rep. 583, 584.

## Easter Term,

7. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

} *Justices.*  
}

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Memorandum.

CASE 1.

IN this Term SIR GEORGE VERNON, one of the Barons of the exchequer, was made *Puisne Justice* of the common pleas, in place of SIR HUMPHREY DAVENPORT, who was made Chief Baron of the exchequer in *Hilary Term* last past; and JAMES WESTON, of the *Inner Temple*, was, by writ returnable *mensæ Paschæ*, made a Serjeant, he appearing in chancery *quarto die post* of the return, being *Thursday*; and the *Monday* following, before all the Justices of the king's bench and common pleas and Barons of the exchequer (none being absent), assembled at *Serjeant's-Inn*, in *Fleet-street*, performed the solemnity, reciting his count, and his robes were there put on; and he made his feast in *Serjeant's-Inn* for the Justices and Serjeants and the king's learned Counsel, and gave rings, according to the usual manner, afterward, with this inscription, "*Servus Regi, serviens Legi*;" and within two days he was made one of the barons of the exchequer.

Mr. Baron Vernon made *Puisne Judge of common pleas*; and Mr. Justice Davenport made Chief Baron.—Mr. Serjeant Weston called.

### Flowers' Case.

CASE 2.

ACTION UPON THE CASE. Whereas she was a midwife, and had used that art for divers years, and by that means gained much maintenance for herself and family; that the defendant, having communication of her and her profession, spake these words of the plaintiff, "Many have perished for her want of skill."—And after verdict, being moved in arrest of judgment, that these words were not actionable, it was adjudged for the plaintiff, for she hath a profitable gain by that function; and therefore these words may be prejudicial.

An action lies for saying of a midwife, "many have perished for her want of skill." *Hutley, 71. Cro. Jac. 504. Ld. Ray. 1480. Cowp. 276. 1. Term Rep. 130.*

*Helier against Hundred de Benhurst.*

CASE 3.

*Easter Term, 6. Car. 1. Roll 233. Berks.*

ACTION upon the statute of *Winton, 13. Edw. 1. ft. 2. ch. 1.* The examination for that he was robbed of seventy pounds, and made hue and cry, and amends was not made, nor any of the robbers taken: and counts upon the statute of *Winton*, and that he took his oath before a justice of the county, though he is not in the county at the time of taking, for it is a ministerial act. *Jones, 239. 1. Roll. Abr. 538. Leon. 322. Sid. 209. Bull. N.P. 186. 5. Com. Dig. 477. Dougl. 465.*

John



HELIER  
against  
HUNDRED  
BENBURST.

*John Saunders*, justice of the peace within the said county of *Berks*, and inhabiting within the hundred, within twenty days before his writ brought that he was robbed, and did not know any of the parties, according to the 27. *Eliz. c. 13*.

Upon not guilty pleaded, a special verdict was found as for the plaintiff according to the declaration; and further, that "he took his oath before the said *John Saunders*, justice of the peace of the said county, and inhabiting in the said hundred, at his chamber in the *Middle Temple, London*:" and so concludes, if upon all the matter the Court should adjudge for the plaintiff, they find for the plaintiff; and if, &c. for the defendant.

The main question was, Whether this examination and oath was taken *secundum formam statuti*?

This matter being argued at the bar, it was alledged by the defendant's counsel, that a justice of peace hath only his jurisdiction within the county where he is a justice of the peace, and may not elsewhere exercise his jurisdiction; and this examination is as justice of the peace of the county where the same act was done. The 27. *Eliz. c. 18*. appoints the oath and examination to be taken by justices of the county inhabiting in or near the hundred (a); and what he doth out of the county is *coram non judice*: and for that purpose were cited 13. *Edw. 4. pl. 9.* and *Plowd. 32. Plat's Case*, that a justice of peace cannot exercise his jurisdiction out of his county, to commit any felon.

(a) 2. *Hawk.*  
ch. 12. p. 117.  
1. *Hale*, P. C. 581.  
2. *Hale*, P. C. 51.

The Court will judge from the special matter found by a jury, although they first find a general verdict according to the issue.

Ante, 76.  
Hob. 33. Cro  
2. Term Rep.

A justice of the peace cannot exercise any jurisdiction or do any judicial act out of the borough or county for which he is appointed.

Dillon, c. 4.  
1. *Hale*, 581.

BUT LITTLETON and GRIMSTON, for the plaintiff, moved, that this verdict finding, that he took the examination according to the form of the statute, and so a general verdict at the first, the finding, after this special matter, is not to purpose; as the case of *Sir Rowland Heyward, Assumpsit*, the jury find a general verdict according to the issue, and a special matter against it, the last is void.—But THE COURT took not any regard to this reason; for the matter in law being found, the Court shall adjudge according to it.

Eliz. 459. 481. Cro. Jac. 55. Dyer, 115. 370. 2. Roll. Ab. 695. 1. Term Rep. 141. 666.

SECONDLY, They moved for the matter, that the examination is well taken in *London*; for the statute doth not appoint that it shall be taken in the county; but by a justice of the peace of the county inhabiting in or near the hundred, &c. and that within twenty days before the writ brought, because he will by intendment be more careful in the examining, he being partaker of the burthen, if it should be recovered against the hundred; and he is to examine as well concerning the robbery, as whether he knows any of the persons who robbed him. And they said, that of these matters, in whatsoever place he be, he may take cognizance and examination; and that they had seen a report, 8. *Jac. 1.* that a justice of peace taking a recognizance out of the county, it was good enough: for which, &c.

And it being moved again, ALL THE JUSTICES agreed, that he is said to be a justice of peace inhabiting in the hundred, where his wife, family, and himself, are usually commorant, although in the Term time he be at *London*.

BUT HYDE, Chief Justice, and WHITLOCK, conceived at first, that the examinations cannot be taken out of the county, because is is out

(a) See 9. Geo 1. c. 7. f. 12.

of his jurisdiction where he is justice of peace, for their jurisdiction is private; but justices of the king's bench may take such examinations or exercise jurisdiction in any place, for their authority is general: and compared it to the Case, where two justices of peace, upon the 18. Eliz. c. 4. set down an order for the keeping of a bastard, it cannot be done by them out of the county; also by the 5. Eliz. c. 4. of Labourers, orders of justices of peace ought to be by them which are inhabitants in the county, and when they be in the county, and not to be made by them out of the same; and therefore because it was taken out of the county, they held it was ill.

But JONES and MYSELF conceived, that this examination and oath, although found to be taken in *London*, he being a justice of peace of the said county, and inhabiting in the hundred, is a person whom the statute appoints and authoriseth to take examinations; and that being taken by him who by intendment will have strict care to the examination, because himself may be liable to part of the charge, it is not material when it is taken. And it is not any act of exercising jurisdiction, but rather a direction that such oath and examination shall be taken before such a person; as if it were appointed that such an oath shall be taken before some knight or judge inhabiting within the hundred, that is not any point of jurisdiction, but a description of the person before whom the examination shall be taken, and which may be as well taken in any other place as in the county; and therefore it was said, that there is difference where a justice of peace doth an act to compel another to perform, as to imprison any for non-performance, or to command one for any offence to be imprisoned; such acts cannot be done in any place but where his jurisdiction extends: but it is an usual course for justices of peace to take informations against offenders in any place out of the county, to prove offences in the county where they are committed; and sometimes they take recognizance to prosecute, and such recognizances taken out of the county by voluntary assent of the parties bind well enough, and are usual; but they cannot compel any out of the county to enter into a recognizance, for they cannot use coercive power out of the county. Whereupon THE COURT would advise.

Afterwards this Case being propounded at the table in *Serjeants-Inn* to THE CHIEF BARON, and to BARON DENHAM, BARON TREVOR, BARON WESTON, and to JUSTICE HARVEY, and I propounding it to JUSTICE HUTTON, they all, after advice, agreed, that this examination taken in *London* by a justice of the peace of the county inhabiting in the hundred, though at that time he were out of the county, was good enough; and JUSTICE WHITLOCK afterwards agreed thereto, because it was not an act of jurisdiction, but only matter of examination to enable the plaintiff to his action. Whereupon afterwards, by the assent of HYDE, *Chief Justice*, judgment was given for the plaintiff.

In the 47. *Ass. pl. 11.* justices of assize take verdicts in other counties, 1. *Hen. 6. pl. 3.* distress may be driven into another county, &c. And in the 27. *Eliz.* in the common pleas, in the Case of *Charren v. Barnes*, a bishop of *Ireland*, being in *England*, committed administration of the goods of one who died intestate within his diocese in *Ireland*, and adjudged good.

HEUER  
against  
HUNDRED OF  
BENHURST.

2. Hawk. c. 8.  
f. 29.  
3 Bac. Abr. 294.  
3 Term Rep.  
38. 380.

But a justice of the peace may take a mere examination out of his borough or county relating to an act done in it, for it is not an act of jurisdiction.

Caldecott's  
Cases, 156.  
2. Hale, 47.  
Stra 1154.  
Doug. 791.

## CASE 4.

## Flower against Elgar.

*An audita querela* lies against a plaintiff on his release of a judgment, although he has taken execution by *elegit*, and assigned it over.

8. C. Jones, 238.

1. Roll. Ab. 307.

2. Roll. Ab. 402.

3. Vern. 50.

**A**UDITA QUERELA. Upon demurrer the Case was: One recovers in debt, and takes execution by *elegit*, whereupon the defendant's lands were *extended*, and after assigned over, and so conveyed from one to another into several hands: and afterwards the plaintiff in the action released all such judgment and executions; and now the defendant brings an *audita querela*: and all this matter was shewn in the writ.

Thereupon it was demurred, Because the writ is brought against the first plaintiff, who did recover, where he had dismissed himself of all the interest of *the extent*, and it ought to have been brought against *the assignee* of the extent.

But, notwithstanding, THE COURT adjudged, that the *audita querela* was well brought; for he being party to the judgment, his release hath discharged the judgment.

## CASE 5.

## Fawkener against Bellingham.

*Ante*, Page 80.

The statute

1. Edw. 6. c. 14.

which gives all

chantries, rents,

&c. which

within five

years had been

paid for the

perpetual main-

tenance of

priests, to the

king, makes no

alteration in the

nature of *old*

*rents*, and *they*

are therefore,

as before, with-

in the limitation

of 32. Hen. 8.

s. 2. Vide S. C. ante, 80.

8. Co. 64. b.

3. Lev. 21

1. Vern. 195.

**E**RROR to reverse a judgment in the common pleas, was argued divers times at the bar; and now this Term at the bench, the error assigned in point of law.

All the Justices, *viz.* HYDE, JONES, WHITLOCK, and MYSELF, argued in one day, and delivered our opinions in order, that this judgment is erroneous, and ought to be reversed; for we all conceived, it was the same rent as before, and not a new rent begun by the statute, but changed by operation of law from a rent service to a rent feck: nor is it a new rent given by the statute, because it doth not appoint any certainty of rent, but refers, that such a rent as the lords thereof had before, they yet shall have, such in quantity, such in estate.

JONES said, that if he had recovered this rent before the statute in an assise, and after the statute had been disseised again, he should have had a re-disseisin, which shews that it is the same rent.

8. Co. 64. b. 3. Lev. 21 1. Vern. 195. Jones, 233. Co. Lit. 168. Moor, 31. 1. Roll. 50.

The statute of

limitations may

be pleaded in

*avowry* for a

rent service

created by

statute.

Ante, 81.

Jones, 233.

8. Co. 64.

1. Rep. 41.

1. H. 28. 36.

And JONES and HYDE conceived, if rent be given by the statute, and no limitation of a distress therein, it is a rent feck, and there cannot be a distress for that rent: but here it is agreed on every part, that to this rent there belongs a distress; and the reason is, because a distress belonged to this rent before, so being changed the distress belongs to it. And it is expressly within the letter and intent of the statute, that no avowry shall be made for rent unless there hath been seisin thereof within forty years; and it doth not appear but that this rent might be lost, for want of seisin, before the 1. Edw. 6. c. 14.: and as the 32. Hen. 8. c. 2. bars to claim it unless he hath had seisin within forty years, so the 1. Edw. 6. c. 14. doth not alter it, nor give more liberty thereto than it had before; and therefore, if it shall be said to be rent created by the statute, it ought to appear by the statute what the rent is in special which



which is created by the statute; but that doth not appear, and therefore it is the same rent which was before, of which the beginning is not known, whereof seisin ought to have been within forty years.

FAWKENER  
against  
BELLINGHAM.

JONES thereupon put this case: Lord and tenant by rents and services; if the tenant by licence at this day make a feoffment by indenture, to hold of him by the same services as he holds over; in avowry for this rent, there ought to be seisin within forty years, for it is not a rent of certainty newly created, but refers to the ancient tenure, which ought to be shewn and seisin proved; but if he create a rent certain, it is otherwise. And there is difference, as all the Justices held, where the saving is of all the rents, for that *nihil certi implicat*, and where it is a saving of a particular rent to certain persons; and it would be a great mischief if there should be such an exception, that rents generally saved by the statutes should be out of the statute of limitation: wherefore they all concluded upon the point in law, that this plea, that he was not seised within forty years, &c. was good, and the judgment given for the defendant, erroneous.

The 32. Hen. 8  
c. 2. of limitations may be  
pleaded to an  
avowry for a  
rent under a  
feoffment made  
to hold by the  
same services  
as the tenant  
holds.  
5 Com. Dig.  
Moor, 31.

But WHITLOCK and HYDE conceived, that the avowry is ill, because it is said that *ultimus presbyter* was seised of the land holden *jure presbyteratus*, whereas none can be seised *in jure del priesthood*, which is his office, but *in jure cantariæ* only. And to that point the other Justices spake not; but upon the point in law they all agreed, that the judgment should be reversed.

Where it cannot  
be alledged that  
a man was seised  
*jure presbyteratus*  
it ought to be  
*jure cantariæ*.  
Ante, 80.

2. Lev. 68. 1. Vent. 223. Plow. 503.

# Trinity Term,

7. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

} *Justices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

## CASE I.

## Ward against Unicorn.

An award that the parties shall execute mutual releases of all actions, suits, and demands, before such a day, is good, though that day is the day before the date of the submission; for it shall not be intended that any new controversy arose on the intervening day.

- 1. Roll Abr. 24.
- Cro. Jac. 525.
- 577. c. 84.
- Cro. Eliz. 839.
- 858.
- 2. Mod. 227.
- 1. Lev. 58.
- 6. Mod. 34.
- 1. Salk. 75.
- 1. Com. Dig. 38c.
- 1. Bac. Abr. 142.
- Kyd on Awards, 119.

**D**EBT for seventy-two pounds. Whereas the plaintiff and defendant, 29 Dec. 6. Car. 1. submitted to an award of all actions, suits, and demands betwixt them, to be arbitrated by J. S. and J. D. so that they made their award by indenture before the 6 January next following; and shews, that they, upon the 5 Jan. by indenture made their award upon the premises, and thereby awarded 72l. to be paid by the defendant to the plaintiff, and that each of them before the 12 January following should make a release from one to another of all actions, suits, and demands, before the 28 December last past; that for not paying this 72l. the plaintiff brings this action. The defendant pleads *nil debet*; and found for the plaintiff.

GERMYN moved in arrest of judgment, that this arbitrament is void, because they did not determine all controversies to the time of the submission; for they appoint a release to be made of all actions and demands until the 28 December; so the 28 December is one day before, and there might divers causes of action arise after the 28 December; and the arbitrament made the 5 January recites, that actions and controversies were then depending: wherefore this arbitrament was void, and the plaintiff ought not to have judgment.

WHITFIELD, *è contra*: for they recite, in their award, that they made their arbitrament *de et super præmissis*; so it shall not be intended that any new cause of action arose upon the said 28 December, unless it be specially shewn. And when they say they made an award *de et super præmissis*; it shall be intended that they made an end of all things submitted unto them (and which were notified unto them), unless the contrary be specially shewn. And this release shall discharge all matters, although they were depending in suit the 29 December, being the day of submission, they arising for causes before: and for that he relied upon *Basspole's Case*, 8. Co. 97. and cited the Case of *Barnes v. Greenway* (a), where a submission made the 4 December of all matters and controversies betwixt them, and the award was of 60l. to be paid in satisfaction of all causes and matters until the 3 December, and so excludes one day before

(a) Cro. Eliz. 838.

the submission, and for this cause exception taken and yet adjudged good; for it shall be intended a final determination of all causes, and there shall not be supposed that any cause did newly arise the 3 December, unless it be specially shewn: so here, &c. for which, &c.

WARD  
against  
UNCORN.

ALL THE COURT was of this opinion; for when he saith they made an award *de super et præmissis*, and it doth not appear to the Court by any special shewing that there is any cause newly arisen upon the said 28 December, the Court will not conceive any; therefore the award is well made, especially when he takes issue, that *nullum tale fecerunt arbitrium*, or *nil debet*, which is all one as this case is. Whereupon a rule was given, that judgment should be entered for the plaintiff, unless cause shewn, &c.

Cro Jac. 578.  
Hob. 190.  
Cro. Eliz. 353.  
Sira. 1024.

Flower against Baldwin.

CASE 2.

Hilary Term, 4. Car. 1. Roll 687.

**TRESPASS.** Upon a special verdict the case was: One bargainer and sells by indenture on the 8 July 20. Jac. 1. The deed is acknowledged the 10 July before a master in chancery. The 9 October following the bargainer suffers a judgment in the common pleas. The 18 October the indenture is inrolled (a) in chancery. Issue was joined, viz. Whether the bargainer was seised in fee at the time of this judgment?

A bargain and sale, when inrolled within the six months, relates to the sealing of the deed so as to avoid incumbrances to strangers; *sed quare*, if it shall avoid a judgment suffered by the bargainer before it is inrolled? *Vide post.* 562.

LITTLETON, for the plaintiff, argued, that the indenture being inrolled shall have relation to the time of the sealing and delivery thereof, and make the bargainee seised *ab initio*, and then the bargainer was not seised at the time of the judgment; and for that he relied upon 8. Edw. 6. Bro. "Inrollment de Faits," 9. where two joint-tenants, the one bargains and sells by indenture, the other dies before inrollment, and the inrollment is within the six months; the moiety only shall pass, for the deed intended to pass but the moiety. And Co. Lit. 147. b. If, after the bargain and sale, the bargainer and bargainee join in a grant of a rent charge, and the deed is inrolled within six months (b), it is the grant of the bargainee, and confirmation of the bargainer. And if bargain and sale be of a manor and an advowson appendant, and the church become void before the inrollment, the inrollment being within the six months, the bargainee shall have the benefit of this presentation, and of all arrears of rents incurred before the inrollment, it being within the six months. So if a bargainee hath a wife and dies, and afterward the deed is inrolled, the wife shall have dower, as it was resolved for the wife of Baron Frevill; and in the Case of *Gawen v. Stacy* (c) it was adjudged, that if the bargainee grant a rent out of the land before inrollment, and afterwards it is inrolled, the grant is good.

2. Inst. 674.  
Co. Lit. 147.  
186. a.  
Cro. Jac. 53.  
Moor, 776.  
1. Com. Dig. 541.  
3. Com. Dig. 167.  
(b) 2. Inst. 674.  
6. Co. 62.  
Hob. 140.  
Dyer, 282.  
Salk. 413.  
6. Mod. 250.  
*Post.* 562.

CHARLES JONES, for the defendant, argued, that until inrollment, the possession and freehold continues in the bargainer, and nothing deverts out of him; for the statute 27. Hen. 8. c. 16. is express, that nothing shall pass until inrollment, so that until the inrollment he remained seised; then the inrollment not being until

(c) 1. Roll Rep. 424.  
*Post.* 284.

(a) *Vide* 27. Hen. 8. c. 16. and 29. Car. 2. c. 3.



FLOWER  
against  
BALDWIN.

the 18 *October*, and the judgment being the 9 *October*, and the issue being, Whether he were seised in fee the ninth of *October*? upon this special verdict the issue is found for the defendant: which is the reason in *Hind's Case* (a), that if a bargainer make a feoffment or levy a fine before the inrollment to the bargainee himself, and afterward the deed is inrolled, the bargainee is in by the fine or feoffment; but the inrollment shall take away all incumbrances made by the bargainer himself to a stranger, that they shall not prejudice the bargainee, for the inrollment hath relation to take away all incumbrances.

ALL THE COURT agreed, that the inrollment of the deed within the six months relates to the sealing of the deed, and makes the bargainee in, to avoid all incumbrances made to strangers after the sealing.

Hob. 165.

2 Inst. 674.

Ante, 100.

BUT JONES, *Justice*, conceived, that *in rei veritate* the bargainer shall be said to be seised always until the inrollment, and nothing pass to the bargainee until the inrollment; for it is so expressly appointed by the statute; and it is *quasi conditio præcedens*, and until it be performed nothing vests in the bargainee. And he cited the Case of *Bellingham v. Alsop*, (b) that if a bargainee before inrollment bargain the land to any other, and after the first deed is inrolled, and afterward the second bargain and sale, and both of them within the six months, the second bargain and sale is void, because there was nothing in him at the time of the bargain and sale. And therefore HE and HYDE, *Chief Justice*, inclined (as this Case was, and the issue joined and found) for the defendant.

See Sanders on  
Uses and Trusts,  
454.

BUT I was of opinion, that when the inrollment is within the six months, he is in *ab initio*, and the fee vests in the bargainee *ab initio*; for the statute of 27. Hen. 8. c. 16. executes the possession to the use; but that is stopped until the deed be inrolled within the six months, and when the deed is inrolled it vests in him *ab initio*, and the possession is expectant to the use at the time of the sealing of the deed; and until the deed inrolled the bargainee hath election whether he will take it by the deed or not; which is the reason, that if he himself in the *interim* take an estate by feoffment or fine, he himself destroys the use, and takes by conveyance at the common law and not by the use; but when he himself doth no act of disturbance, and the inrollment is within the six months, it shall relate to the date of the deed; and that is the reason he shall have all rents incurred in the mean time, and the benefit of presenting to churches when they fall, and shall be said seised *ab initio*; and then the bargainee is seised the said ninth day of *October*, being the day of the judgment, and not the bargainer, &c.

THE COURT, thereupon, would further advise.

(a) 4. Co. 71. a.

(b) Cro. Jac. 52.

Atkey *against* Heard.

CASE 3.

**T**ROVER AND CONVERSION of goods of the intestate's. In trover by an administrator, if the *conversion* be in his own time, he shall pay costs. Ante, 19.

The time of the conversion being supposed after the administration committed, on verdict being found against the plaintiff, the question was, Whether the plaintiff should pay costs?—And IT WAS RESOLVED, that this action, being grounded upon the *conversion* in his own time, and not in the time of the intestate, was as his own proper action; wherefore he should pay costs.

S.C. Jones, 241.  
3. Levinz, 60. 375. 6. Mod. 93. 2. Com. Dig. 549. Cowp. 371. *Sed vide* Cockerill v. Ky-naston, 4. Term Rep. 277. *Easter*, 31. Geo. 3.

Taylor *against* Willes.

CASE 4.

Trinity Term, 5. Car. 1. Roll 1204.

**E**RROR upon a judgment in *Exeter*, in an action on the case upon an *assumpsit*, That in consideration the plaintiff *Willes* would deliver two hundred and a quarter of wood, the defendant *Taylor* assumed to pay as much as it should be reasonably worth; and upon another consideration assumed to do another act. *Taylor* pleaded *non assumpsit*. The jury find *quod assumpsit*, and assess for damages thirty-three pounds six shillings eight-pence, *to be paid in dyeing, if by law it may be*, and assess for costs six shillings eight-pence. The judgment given was, that he should recover the thirty-three pounds six shillings eight-pence for damages assessed by the jury, and the costs; upon which a writ of error was brought.

GERMYN, *for the plaintiff* in the writ of error, assigned for error, FIRST, That the verdict is ill, Because they find generally *quod assumpsit*, and do not divide them, being several.—*Sed non allocatur*: for if they were upon several promises, yet "*non assumpsit*" generally is good; and the verdict so general is good.

SECONDLY, Because it was found, that the damages of thirty-three pounds six shillings eight-pence are to be paid in dyeing, if by law it may be.—*Sed non allocatur*: for the finding the *assumpsit* is good enough, and so was the assessing damages to thirty-three pounds six shillings eight-pence; but that which is found after is void; and the judgment omitting that which was void, is good enough. The judgment was therefore affirmed.

*plurage*. Ante, 76. 130 174 — 2. Roll. Ab. 695. Moor, 331. 1. Leon. 92. 2. Saund. 308. Savil, 112. 2. Lev. 253. Hob. 117. 5. Bac. Abr. 298. Dougl. 667.

Mariot *against* Kinsman.

CASE 5.

Michaelmas Term, 5. Car. 1. Roll 38.

**D**EBT upon an obligation. The defendant demands *oyer* of the condition, which was, WHEREAS he had taken A. S. a widow, to wife, being possessed of divers goods, if he should permit his said wife to make a will, and to dispose in legacies as much as she would not exceeding fifty pounds, and pay and perform what she appointed, so that it did not exceed fifty pounds, that then, &c.

The defendant pleads, that she did not make any will.

Ante, 204. Post. 376. 597 — 1. Mod. 211. 2. Mod. 172. 11. Mod. 221. 12. Mod. 288. Perk. 501. Cro. Eliz. 27. 1 Vern. 244. 408. 2 Vern. 329. Prec. Ch. 44. 84. 255. 2. Will. 82. Stra. 891. 1111. Ld Raym 515. Salk. 235. 2. Bac. Abr. 49. and the Cases there cited. 2. Com. Dig. 156. 3. Term Rep. 618.

The

MARIOT  
against  
KINSMAN.

Gillb. Dev. 12.

The plaintiff takes issue thereupon; and it was found, that she made a will, and thereby disposed of divers legacies not exceeding the sum of fifty pounds; but that she was *covert* at the time of the will making, &c.

See Sanders on  
Trusts, 531.

IT WAS ADJUDGED for the plaintiff; for although she, being a *feme covert*, could not in law be permitted to make a will to dispose of any goods without the husband's assent, yet it is a will within the intent of the condition; for it was the intent of the condition that she should make a will to that purpose notwithstanding the *coverture*; and it is but her appointment, which the husband by his obligation is bound to perform, for which the finding that she was a *feme covert* is not material. Whereupon a rule was given, that judgment should be for the plaintiff, unless other matter was shewn, &c.

#### CASE 6.

#### Drake's Case.

The court of  
high commission  
prohibited in a  
suit for alimony.  
Ante, 114.  
Cro. Jac. 364.

**P**ROHIBITION to stay a suit in the spiritual court before the commissioners ecclesiastical for ALIMONY; where *the libel* supposeth divers particular cruelties used upon the wife, for which she was enforced to depart; and that the husband would not allow her any maintenance, and therefore she sued before the ecclesiastical commissioners for *maintenance*.—And because it is a suit properly suable before the ordinary, wherein if there be any wrong, the party grieved may have an appeal; and although this is one of the articles whereby authority is given them by the commission to hear and determine, yet because it is not any of the causes which are within the 1. Eliz. c. 1. s. 18. (a) for which causes the commission is ordained, the Court awarded a prohibition *ex motione* LAURENTII HYDE, *militis*.

(a) Repealed 16. Car. 1. c. 11. s. 3.

#### CASE 7.

#### Rockey against Huggens.

Trinity Term, 4. Car. 1. Roll 764.

A custom that a  
copyholder for  
life may cut  
down and sell  
timber trees at  
pleasure is un-  
reasonable and  
void; but per-  
haps such a  
custom may be  
good for a  
copyholder of  
inheritance.

Jones, 245.  
1. Roll. Ab. 560.  
650. 660.  
Moor, 392.  
4. Co. 31.  
Cro. Eliz. 292.  
361. 498.  
Cro. Jac. 30.  
Noy, 2.  
1. Bull. 50.

**E**JECTMENT. Upon a special verdict the Case was, A copyholder for life pretending a custom in a manor, that he may cut down and sell elms growing upon his copyhold; and the lord, pretending that there was no such custom, or, if there were, that it was void and against law, enters for a forfeiture, and makes the lease to the plaintiff: the copyholder re-enters; and upon not guilty pleaded, the jury found, that the land was copyhold for life, and that he cut down elms, being timber-trees, and sold them: and found the custom of the manor as the copyholder pretends.

And, Whether it were a good custom or not? was the question.

It was oftentimes argued at the bar by GERMYN and BRAMPSTON, *Serjeants, for the plaintiff*; and by ROLLE and CHARLES JONES *for the defendant*.

And now this Term ALL THE COURT resolved for the plaintiff; for this custom found is a void and unreasonable custom, and not allowable by law, that a copyholder for life may cut down and sell timber-trees, and dispose of them at his pleasure; for it is in destruc-

6. Mod. 94. 2. Com. Dig. 513. 523. Co. Lit. 62. a.

tion



tion of the inheritance, and against the nature of a copyholder for life. But peradventure there may be such custom for a copyholder of inheritance, that being only to the prejudice of him and his heirs; and when he hath *quasi* an inheritance in the copyhold, he hath so likewise in the trees growing thereupon. But a copyholder for life hath but a particular estate in the land, and so he hath in the trees; and it is unreasonable that he should cut down, sell, and destroy the inheritance, and it would be to the great prejudice of those who succeeded, for they should not have to maintain the house and the plough.

And although it was urged at the bar, that it being found to be the custom, the Court shall not adjudge it ill and unreasonable, when it may have reasonable beginning; for as lessee for life may be without impeachment of waste, so it may be here, that the lord granted it at the beginning with this liberty, and the lord by that means might have the greater fine upon the granting of the copyhold; and this copyhold being by intendment always in the hands of particular tenants, it may be supposed that they planted and nourished them, and therefore should have the greater liberty to cut down and dispose of them.

But THE COURT held, that these reasons will not maintain this custom; for lease for lives or years, without impeachment of waste, ought to be begun by deed, and without deed is good: and it is against the nature of the estate of a copyholder, that he should do acts in destruction of his estate; therefore customs which maintain them shall be allowable, but not *à converso*. And a precedent was shewn to the Court, *Powell v. Peacock* (a), where such a custom was pleaded in trespass, and adjudged it was not good.

And I myself have seen the report of the case of *Rowles v. Masters* (b), upon a special verdict in an ejectment, which was adjudged in Trinity Term, 10. Jac. 1. where the custom of *Beauminster* was that a copyholder for life might nominate his successor, and so in *perpetuum*, &c. that such a copyholder might cut down and sell timber-trees; all the Justices argued, that where such a copyholder hath the inheritance, and where his successor comes in by his nomination (whom by intendment he would not prejudice), there such a custom might be good. But they all agreed, such a custom for a copyholder for life to cut down and sell trees, was not good; and they there cited the case of *Powell v. Peacock* to be so adjudged, and to be good law.—And so ALL THE COURT here held, that this custom found is void and unreasonable. Whereupon it was adjudged for the plaintiff.—

*Vide* 14. Edw. 3. "Barr." 77. 21. Hen. 7. pl. 40. 11. Hen. 7. pl. 14. 9. Hen. . pl. 4. "Wast," 59.

(a) Cro. Jac. 29. Jones, 245.

(b) 1. Brownl. 132.

### Congham against King.

Hilary Term, 6. Car. 1. Roll 114.

COVENANT against the defendant as assignee of an assignee, for not repairing of an house let *inter alia*.

The defendant takes issue upon the mean assignment of the lease laid in the declaration.

pair; if the lessee assign all his estate in parcel of the land demised, and the assignee do not repair the part to him assigned, the original lessor may bring an action on the covenant against the assignee of

ROCKEY,  
against  
HUGGENS.

(a) Co. Cop. 85.  
1 Roll. Ab. 569.

(b) 2. Roll.  
Ab. 56.  
2. Brownl. 85.  
192.  
W. Ent. 440.

CASE 8.

On a demise to A. of several parcels of land with a covenant on the part of the lessee to re-

WRIGHT,

CONGRAM  
against  
KING.

S. C. Jones, 245.  
1. Roll. Ab. 522.  
Doug. 187. 461.

1. Roll. Ab. 234.  
b. 4.  
Ld. Raym. 800.

In covenant, a  
breach assigned  
in such a house  
parcel of the  
premises, it shall  
be intended in  
the lands demif-  
ed.

11. Co. 51. a.

Covenant will  
lie against an  
assignee of part  
of the thing de-  
mised.

1. Roll. Ab. 522.  
5. Co. 16. b.  
Wood's Convey.  
p. 426.

1. Saund. 239.

2. Com. Dig. 222. 3. Term Rep. 393.

#### CASE 9.

A husband may  
release costs gi-  
ven to his wife  
by the spiritual  
court for defa-  
mation; but he  
cannot release  
his suit.

1. Roll. Rep.  
426.

2. Roll. Ab.  
278.

Wood's Inst. 63.  
Strange, 576.

WRIGHT, after verdict for the plaintiff, took divers exceptions to the declaration in arrest of judgment, that the plaintiff shews the lease to be to *J. S.* and by him devised to *J. D.* and made *J. N.* his executor, and that he *virtute legationis* entered and assigned to *W. S.* and he entered and assigned one house, parcel of the premises, to the defendant, who entered and made spoil in an hall and chamber, parcel of the demised premises, &c. One exception was, Because he shews that the devisee entered and was possessed *virtute legationis*, and doth not say, that the executor assented.—*Sed non allocatur*: for being alledged, that he thereof was possessed *virtute legationis*, and issue being taken upon a collateral matter, it shall be intended that he entered with the assent of the executor.

Another exception was, Because the breach was assigned in such an house parcel *præmissorum*, and doth not say *præmissorum prædimissorum*, and to him assigned; for in the lease are divers things excepted, and it may be that this is parcel of the things excepted, and not parcel of the premises assigned.—*Sed non allocatur*: for *præmissa* shall be intended *prædimissa et assignata*, and shall not be extended to any lands not *dimissa*.

The next exception alledged was, That the defendant is but assignee of parcel of the things demised; and then he is not chargeable with this covenant, no more than the assignee of parcel shall be charged in debt for the rent; but the action lies against the first lessee, as it is held *Walker's Case* (a).—*Sed non allocatur*: for this covenant is dividable, and follows the land, with which the defendant, as assignee, is chargeable by the common law, or by the statute of 32. Hen. 8. c. 37. Whereupon it was adjudged for the plaintiff.

(a) 3. Co. 23.

A FEME COVERT sues in the spiritual court (without her husband, as she may) for defamation; and sentence for her, and costs assessed. In appeal of this sentence to THE ARCHES, the defendant pleads there the release of the husband as well for the sentence as for the costs, which was there disallowed. Whereupon he prayed a prohibition.

For it was alledged, that as a wife may sue, so the husband may release, and that being released is to be guided according to the common law.

But THE COURT conceived, that the release of the husband cannot be a bar to this suit *quoad reformationem morum*: for the wife being scandalized, may sue in the spiritual court to be repaired therein; and the Court may sentence the defendant to a submission or corporal satisfaction, which the husband cannot release; but for the release of the costs, the husband may well do it. Whereupon rule was given, if cause were not shewn at a day, &c. that a prohibition should be awarded to stay the suit *quoad* the costs.

Sir

Sir William Masham *against* Bridges.

CASE 10.

**A**CTION ON THE CASE FOR WORDS. Whereas he was a justice of peace of the county of *Essex* by virtue of the king's commission for the space of ten years; that the defendant, the first of *January*, 6. Car. 1. spake of him, being then justice of peace of the same county, "*Sir William Masham* is but an half-eared justice, he will hear but on one side." After verdict, upon not guilty pleaded, and found for the plaintiff,

To say of a justice that he is but "*half-eared*," and "*will only hear on one side*," is actionable; and an allegation that he has been in the king's commission longer than the king has reigned, is surplusage.

JONES moved in arrest of judgment, that he hath alledged he was justice of peace by virtue of the king's commission for ten years last past, which cannot be, for the king hath not reigned so many years; so it is impossible and contrary in itself; and without shewing that the words were spoken of him as of a justice of peace, the action lies not.

Ante, 14.

ALL THE COURT were of opinion, that if it be not sufficiently shewn he was a justice of peace at the time of speaking the words, and so no scandal to him as justice of peace, the action lies not. But the whole Court conceived, although the first words, shewing he is a justice of peace by the king's commission, &c. were void and apparently vitious (for it is impossible), and if he had rested there, and there had been no other shewing of his authority, the action would not have lien; yet when he shews that he spake of him such words, *ad tunc* justice of the peace (which is at the time of the speaking of the words), that sufficeth; and what was alledged before is but surplusage and vitious. And for the words they held, that they were scandalous (being spoken of a justice of peace). Whereupon it was adjudged for the plaintiff.

1. Roll Ab. 48.  
Yelv. 143.  
Cro. Jac. 9. 240.  
1. Lev. 280.  
Cro. Eliz. 358.  
4. Co. 16.  
8. Mod. 270.  
Ld. Ray. 1369.  
Salk. 695.  
Stra. 420. 1158.  
Doug. 667.

Sankill *against* Stocker.

CASE 11.

**A**CTION FOR WORDS. After verdict for the plaintiff, it was moved in arrest of judgment, that here is a mis-trial, not aided by any statute; for upon the *venire facias* there were but twenty-three jurors returned, where there ought to have been twenty-four; and the trial was made by ten of the principal panel, and two of the *tales de circumstantibus*.

A trial by a *tales* where only 23 instead of 24 jurors are returned is erroneous, although 10 of the 12 who tried the cause were of the panel.

But JONES, WHITLOCK, and HYDE, *Chief Justice*, conceived, that, the trial being made, the non-returner of the twenty-fourth is but a mis-return of the sheriff, which is aided by the 18. *Eliz. c. 14*. And for this the case of *Tyrrill v. Gardiner* (a) was cited, where upon the *venire* twenty-three were returned, and the trial was by twelve of them, that was good, and aided by the statute.

Post. 278.  
S.C. Jones, 245.  
1. Roll. Ab. 800.

But against that it was urged by MAYNARD (and I MYSELF was of that opinion), that where the trial is by twelve of the principal,

(a) 5. Co. 37.



SANKILL  
against  
STOCKER.

it is good; but if there were not twelve of the principal sworn, it shall not be good. And for this purpose was cited the case of *Calthorp v. News* (a), where in like manner a trial was by ten of the principal and two of the *tales*, and it was adjudged a mis-trial.—Whereupon twas adjourned.

A mis-return to  
a venire facias  
is aided by the  
statute of joco-  
sails.

Dougl. 115.  
1. Term Rep.  
193.

But afterwaras, upon conference with THE JUSTICES of both *Serjeants-inn*, the greater part of them conceived, it was but a mis-return, and aided by the 18. *Eliz.* c. 14. and 21. *Jac.* 1. c. 13. And although the trial was by two of the *tales*, it is not material to the parties, nor prejudicial to any of them, but only to the jurors, who lose their issues; and it being but a mis-return by the sheriff, was aided by the statutes. Whereupon it was adjudged for the plaintiff.

(a) Cro. Jac. 647. See 3. Geo. 2. c. writ of error the judgment was reversed.  
25. f. 8. 1. Roll, Ab. 800. pl. 8.

(b) *Sed quere*; for it is said that on a

Michaelmas

## Michaelmas Term,

### 7. Car. 1. In the King's Bench,

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

} *Justices.*

William Noy, *Esq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Memorandum.

#### CASE 1.

**I**N this vacation, viz. 25 August, 1631, SIR NICHOLAS HYDE, HYDE, C. J. Chief Justice of the king's bench, being a grave, religious, discreet man, and of great learning and piety, died at his house in the county of Southampton; and is succeeded by SIR THOMAS RICHARDSON, RICHARDSON. Ante, 65. Post. 403. Jones, 247. *Chief Justice of the common pleas,* was made Chief Justice of the king's bench, and sworn the 24th of October. He came to the said bench attended with divers of the serjeants: and being in the court (after a speech by the Lord Keeper, signifying the king's pleasure, and his answering shortly thereto), he was sworn, and his patent read, which was a writ under the great seal, directed to him by the name of "THOMAS RICHARDSON, *Chief Justice of the common pleas,*" that the king had appointed him to be Chief Justice of the pleas before himself to be held; and commanded him to attend the said office; which being read, he took his place in the court.

The same day SIR ROBERT HEATH was sworn serjeant in chancery: and on the 25th of October, being Tuesday, came in his party-coloured robes to the common pleas and performed his ceremonies as serjeant; and the same day kept his feast at *Serjeants-Inn*, in *Chancery-lane*, and gave rings to every of the Judges, *quorum inscriptio fuit*, "LEX REGIS, VIS LEGIS." And afterwards, upon the 27th of October, being Thursday, he was sworn Chief Justice of the common pleas.

The next day after WILLIAM NOY, one of the readers of *Lincoln's-Inn*, was made king's attorney general.

Sir Robert Heath promoted.

Noy made attorney general.

### Smith against Norfolk.

#### CASE 2.

**D**EBT, as administratrix to Smith her husband, for two-and-twenty pounds due upon a lease for years made by the intestate for one quarter's rent due in the life-time of the intestate, and two quarters rent after his death; the lease being made for one-and-twenty years by the intestate out of a lease for years whereof he was possessed, both of them having continuance for divers years yet to come. And the action was brought in the *detinet* only; and verdict for the plaintiff.

NOY and GERMYN moved in arrest of judgment, that the declaration was not good, because for the two last quarters of rent, due after

Debt by an administratrix against a lessee for rent is well brought in the *detinet* only, though part of the demand accrued after the death of the intestate.

F. N. B. 119. m.

Cro. Jac. 238. 546. 685. Reg. 139. b. 1. Lev. 250. Skin. 5. Cro. Eliz. 226. 712. Savil, 130. Hob. 172. Carth. 49. 1. Sid. 342.

SMITH  
against  
NORFOLK.

Cro. Jac. 546.  
Cro. Eliz. 712.  
1. Mod. 185.

after the death of the intestate, the action ought to have been in the *debet et detinet* (a). And for that they relied upon *Hargrave's Case* (b).

But JONES, WHITLOCK, and MYSELF held, that the action was well brought in the *detinet*, she having the interest only as administratrix (c); and that *Hargrave's Case* reported is not law.—And JONES said, he knew it to be reversed in point of judgment for this cause.—Whereupon rule was given, that judgment should be entered for the plaintiff, unless other cause was shewn, &c.

(a) *Vide* 16. & 17. Car. 2. c. 8. and (c) *Strange*, 1271. 1. Will. 171.  
4. & 5. Ann. c. 16. Ld. Raym. 1513. Cowp. 570.  
(b) 5. Co. 31.

### CASE 3.

### Tavernor against Skingle.

A submission that if the arbitrators "do not agree," they may chuse an umpire, shall be intended, if they did not agree "and make an award."

1. Roll. Ab. 148.  
1. Sid. 151.  
Salk. 659.  
2. Term Rep. 643.  
3. Term Rep. 592.  
Kyd on Awards, 44.

DEBT upon an obligation of one hundred pounds, conditioned to perform the award of J. S. and J. D. so as they made their award before the tenth of *October* following, under their hands and seals; and if they did not agree, then to stand to the umpirage of J. N. so as he made it in writing under his hand and seal before the twentieth of *October* following.

The defendant pleaded, that the said J. S. and J. D. did not make any award before the tenth of *October*, nor J. N. the umpire before the twentieth of *October*, &c.

The plaintiff replies, True it is that J. S. and J. D. did not agree, nor make any arbitrament before the tenth of *October*; but that J. N. the umpire did make an award before the twentieth of *October* under his hand and seal, and shews it; wherefore *inter alia* the defendant was to pay to the plaintiff thirty pounds upon such a day, at the house of *William Sutton*, in *Chelmsford*, being the sign of the *Cock*; and for the non-payment of the said thirty pounds alledgeth the breach.

The defendant thereupon demurs.

WRIGHT, for the defendant, moved, that this submission is void and uncertain; for it is, "if they do not agree," and it doth not appear to what they should agree; and an uncertain submission is void.

*Sed non allocatur*: for the words, "if they do not agree," have the intendment, if they do not agree and make their arbitrament under their hands and seals before such a day; for otherwise it is *quasi* no agreement within that condition.

WRIGHT then moved, that this arbitrament by the umpire was void; for he appoints money to be paid at the house of a stranger, wherein by intendment the defendant hath no interest, nor can compel him that is owner of the house to suffer money to be paid there; and an arbitrament ought not to appoint a thing to be done to a stranger, or by a stranger, over whom the defendant hath no power, nor in a stranger's house; by which act the defendant might be a trespasser. 5. Co. 77. 22. Hen. 6. pl. 46.

But ALL THE COURT agreed, that the arbitrament was good; for the appointment of the payment of the money at a stranger's house (especially being by intendment a common inn) cannot be unreasonable, or shall make an unlawful act; but by intendment the plaintiff will procure such kindness that the money may be paid there;

An award appointing one of the parties to pay money at or in the house of a stranger, is good.  
Post. 433.  
Moor, 3.  
10 Co. 131.  
1 Roll. Ab. 147.  
Plowd. 71.  
3. Lev. 153.  
1. Roll. Rep. 6.  
Jones, 431.  
1. Mod. 9.  
3. Salk. 74. 1. Com. Dig. 384. Kyd on Awards, 126.



there; and if the stranger shall deny the payment to be there, it peradventure may be a good excuse for the defendant: but the arbitration by itself, *primâ facie*, is good enough. Whereupon it was adjudged for the plaintiff.

TAVERNOR  
against  
SKINGLE.

Beamond against Long.

CASE 4.

*Ante, fol. 208.*

THE Case was now moved and argued by MAYNARD, *for the defendant*, and by ROLLE, *for the plaintiff*. And for the plaintiff he first argued, that although the husband shall not have a debt due to the wife after her death without recovery, yet if they bring debt and recover, and after the wife die, the husband shall have that debt, *quia transit in rem judicatam*: and although the husband here should have execution in the right of his wife as administratrix, he could not have it to his own use, but to satisfy the debts of the intestate; and when they are satisfied, he is chargeable over in accompt to the next administrator, or peradventure shall be chargeable for that debt as an executor *de son tort demesne*; and they having been at the charge to recover that debt, and costs and damages awarded to them, it is no reason the husband should lose them. And he cited one *Prest's Case* in the common pleas, where an administrator, *durante minore etate*, recovered in debt, that the executor at his full age might have execution of that debt.

If a feme executrix to A. marry, and then husband and wife bring debt on an obligation against B. in right of the wife as executrix, and have judgment to recover debt, damages and costs, and the wife dies before execution, the husband cannot have a *scire facias* on the judgment; for although he was privy thereto, yet he is not entitled to the thing recovered. *Ante, 167. 208. Post. 451. 464.*

But ALL THE COURT, HYDE, *Chief Justice*, being dead, and none in his place, conceived, that this *scire facias* lies not; for the first action was brought by the husband and wife *administratrix*, which is in *another's right*; and the recovery being thereupon, is in right of the intestate: and the wife being dead, the husband cannot claim that debt; for he not being administrator hath not any interest therein; for the administratrix being dead, the suit is merely determined, and cannot be revived by any but by him who comes in in that right, and so doth not the husband: and it differs not from THE YEAR-BOOK (a), where an executor recovers debt and dies intestate, the administrator cannot have a *scire facias*, because he is not privy to that judgment, and he claims not *paramount* the judgment; and they doubted of *Prest's Case*. But it is clear, if administration be committed because no will is extant, and the administrator recover in debt, and after the will is proved wherein there is an executor, such an executor shall never have a *scire facias* upon that judgment. And although it was objected that the judgment is for costs and damages, which belong to the husband, although the said debt did not belong to him, and therefore the *scire facias* should be maintained for the damages; yet THE COURT held, that the *scire facias* to have execution of the judgment for the debt, and also for the damages, is not maintainable: and, Whether he might maintain a *scire facias* for the damages and costs? they would not deliver any opinion. Yet it appears 19. *Edw. 4. pl. .* if one recover, in a real action, land, and damages, and die before execution, the heir shall have a *scire facias* to have execution for the land, and the executor for the damages. But for the principal case they all held, that the *scire facias* lies not as it is brought; and gave

S. C. Jones, 248.  
S. C. 1. Roll.  
339.  
Godb. 604.  
1. Roll 921.  
Cro. Jac. 4.  
Hob. 250.  
1. Sid 337.  
Cro. Eliz. 844.  
3. Mod. 188.  
Salk. 116.  
Skin. 682.  
1. Com. Dig.  
251.  
2. Bac. Ab 385.  
Douglass 637.

(a) 22. Hen. 8. pl. 9 cited in Bradnell's Case, 5 Co. 2 b.

judgment

BEAMOND  
against  
LONG.

judgment for the defendant.—This case being moved at the tables Serjeants-Inn to the Chief Baron and other barons, and to HARVEY, Justice, they all agreed in the same opinion (a). *Vide postea*, 464.

(a) See 17. Car. 2. c. 8. by which an *facias*; and 29. Car. 2. c. 3. that the husband administrator *de bonis non* may sue *scire* band shall have administration.

## CASE 5.

## Reynell against Champernoon.

The owner of a several fishery may detain nets or other engines *damage feasant*; but if he cut or destroy them, trespass will lie.

3. Burr. 1170.  
2. Wilk. 313.  
5. Com. Dig. 360.  
2. Espin. Dig. 106.  
Douglass. 56.

**T**RESPASS, for taking and cutting of his nets and oars. The defendant justifies, For that he was seised in fee of a several piscary, and that the plaintiff, with divers others, endeavoured with their oars to row upon his water, and with the nets to catch his fish; and for the safeguard of his fishing he took and cut the nets and oars, &c. Whereupon the plaintiff demurs.

It was moved by BULSTRODE WHITLOCK, that this plea is not good, for he cannot by such colour cut the nets and oars.

ALL THE COURT was of this opinion, for the reason *supra*; but he might have taken the nets and oars, and detained them as *damage feasant*, to stop their further fishing. Whereupon it was adjudged for the plaintiff.

## CASE 6.

## Tyler against Wall.

In trespass, justification by a warrant need not answer or traverse the day laid, if it aver it to be the same trespass; but a confession and avoidance of the plea, by alledging a subsequent trespass, is a departure from the declaration.

Post. 246. 334.  
514-573.  
Bro. Tref. 219.  
2. Saund. 295.  
1. Sid. 294.  
1. Bull. 138.  
1. Freem. 246.  
Lutw. 452. 1457  
2. Jones, 146.  
3. Lev. 277.  
Raym. 86.  
5. Com. Dig. 86. 99.  
3. Bac. Ab. 519.  
Bull. N. P. 17.  
1. Term Rep. 479.  
H. Bl. Rep.  
C. B. 555.

**T**RESPASS of assault, battery, and imprisonment *ultimo die Octobris, sexto Caroli*, at Withering, and carrying him to Tiverton, and detaining him in prison for two days. The defendant justifies, Because, 13 August, 6. Car. 1. a writ of *supplicavit de bono gestu* issued out of chancery, and by a warrant from the sheriff to the defendant, being his bailiff, he arrested the plaintiff the twenty-first of September, and detained him two days, and carried him to Tiverton, and delivered him to the sheriff; which is the same arrest, detention, and imprisonment, &c. The plaintiff replies, and confesseth the writ, warranty, and arrest, the twenty-first of September, and imprisonment for two years, as the defendant hath alledged; but shews, that he afterward found surety before the sheriff according to the writ, and was discharged; and that the defendant "*postea, VIDELICET, prædicto primo Octobris, sexto Caroli*," assaulted and imprisoned him, *de son tort demesne*. *Et hoc, &c.* And upon this the defendant demurs.

HUTCHINS, for the plaintiff, now moved that the plea in bar was not good, because he doth not answer the time in the declaration,

"VIDELICET, *ultimo Octobris*," neither by answer nor by traverse.

BUT GRIMSTON, for the defendant, argued, that the justification being of an act in the same county, and justifying all the time in the declaration, although it doth not agree with it in the day, but concludes *quæ est eadem transgressio, &c.* is good enough, the day not being material.

And ALL THE COURT were of the same opinion; and also conceived, that the replication was not good, varying from the day in his declaration, and is a departure therefrom.

Hughs,

## Hughs, Administrator of J. D. against Harrys.

CASE 7.

**A**CCOMPT against the defendant; for that he occupied, as guardian of J. D. for nine years, such lands which were granted to W. D. father of J. D. and his heirs, by copy of court-roll, *tenendum secundum consuetudinem manerii* of O. who entered and died seised thereof, which descended to the said J. D. and the defendant received the profits as guardian; and afterwards J. D. died, and the plaintiff, as administrator to him, brings the action.

The defendant pleads, that he did not receive the profits as guardian: and issue being joined thereupon, it was found for the plaintiff.

And now GRIMSTON moved in arrest of judgment,

FIRST, That the declaration is not good, because he doth not recite the statute of *Marlbridge*, according to the usual course in such declarations.—*Sed non allocatur*: for being a general law, it needs not to be recited: also that statute doth not give the action, but it is only in affirmance of the common law; as *Co. Lit.* 89. a. is.

SECONDLY, It doth not appear that they were freehold lands, but may be copyhold; then against such a person which occupies a copyhold ACCOMPT lies not.—*Sed non allocatur*: for although it be mentioned that the land is granted by copy, it is not said, *tenendum ad voluntatem domini*; so it may be well intended a freehold. And in *Wales* there are many freeholds granted *by copy* and *by virge*.

For the plea, which was, that he did not receive as guardian, it being found against him, he shall be intended lawful guardian.—Whereupon it was adjudged for the plaintiff.

An estate granted by copy, &c. omitting the words *ad voluntatem domini*, shall be intended a customary freehold;

ACCOUNT lies against a stranger as guardian, who enters and receives the profits.

It is not necessary to recite the *stat. of Marlbr.* in the declaration.

Post 245. 514.

2 Inst. 404.

F N. B. 17.

1. Roll Ab 119.

362.

1. Roll Ab. 17.

Reg. 36.

Co. Lit. 172. a.

58.

9. Rep 76.

Co Copyh. f. 31.

2. Vent. 143.

90. 2. Com.

Carth. 432. 2 Wils 125. Ld. Raym. 1225. 2. Bl. Com. 149. 1. Com. Dig. 86. Dig. 530. 2. Hawk. P. C. 349.

## Anonymous.

CASE 8.

**A**CTION for these words of an attorney: "Thou art a knave, and stirrest up suits betwixt parties; and stirredst up a suit betwixt such parties to their undoing; and it is great pity such persons should go unchanged."—ADJUDGED for the plaintiff, that the action lies.

Words actionable. Post 516.

## Hollinghead's Cafe.

CASE 9.

**H**OLLINGSHEAD prayed a *prohibition* to stay a suit in the spiritual court for defamation, for speaking these words: "Thou art a bawd, and I will prove thee a bawd."—And because these words properly determinable in the spiritual court, and for which no action lies at the common law, a prohibition was denied: but for saying, "Thou keepest an house of bawdry," this being matter determinable at the common law by indictment, suit shall not be in the spiritual court. *Vide* 27. Hen. 8. and 4. Co. 20. a.

It is not action able to call a woman a bawd; but it is cognizable in the spiritual court. S. C. post. 261. Post. 285. 329 393.

Jones, 216.

11 Mod. 113

2. Roll. Ab. 296. 1. Freem. 300. 3. Lev. 18. Saik. 692. 696.

CRO. CAR.

Q

Sanders



## CASE 10.

## Sanders against Cornish.

Trinity Term, 5. Car. 1. Roll 840.

An executory devise of a term of years upon contingencies so remote as to create a possible perpetuity is void.

J. Roll. Ab. 611, 612.

Jones, 15, 16.

8. Co. 95. a.

Cro. Jac. 198. 461.

3. Cha. Caf. 36.

Salk. 225. 229.

12. Mod. 287.

1. Vern. 164.

Forres, 232.

Dyer, 74. 358.

1. Sid. 451.

Skin. 341.

Stra. 133.

1. Black. Rep.

189.

1. Brown's C. C.

170. 187.

2. Brown's C. C.

33.

See Mr. Cox's

edit. Peere Will.

3. vol. 262. and

the cases there

cited; and 2. Bl.

Com. 174.

3. Burr. 1634.

2. Com. Dig.

369.

2. Bac. Abr. 78.

Comp. 309.

Dougl. 487. 506.

2. Term Rep.

209.

3. Term Rep.

143. H. Bl.

Rep. 30.

**T**RESPASS for breaking his close at *Westbrook*. Upon not guilty pleaded, a special verdict was found, that

*Simon Sanders* was possessed of a lease for one hundred and three-score years of the land in question; and by his will in writing, reciting that he had such a lease, deviseth, that his brother *Christopher Sanders* should have the use and occupation thereof, and should take the profits of it during his life; and after his death, the use and occupation should remain to the wife of *Christopher* during her widowhood; and after her widowhood, the use, occupation, and profits of the premises to be and remain to the eldest son of the said *Christopher*, which he shall happen to have, during his life; and after, such son dying without heir male, to any other son which the said *Christopher* shall happen to have, one after another, in form aforesaid. "And if the said *Christopher* happen to die without heir male of his body, and for that I have a purpose to have the same lease kept in my name, my will and meaning is, That the use and profits and occupation shall remain and be to *Simon Sanders*, &c. in the same manner as before," &c.; and so to divers others in the same words; and makes the said *Christopher* and *Simon Sanders* his executors, and dies possessed: and that the said executors proved the will, and assented to the said legacy; that *Christopher* entered, and died without issue, and made the said *Simon* his executor; which *Simon* entered, and had issue *John*, and the plaintiff his eldest son, and after made *John* his son executor, and died; and *John* proved the will and entered, and made the defendant his executor, and died; and that the plaintiff entered, and the defendant ousted him: and if, &c.

The question was, Whether this devise of a term in this manner be good to go in remainder; and if such remainders, the one after the other, and limitation of the devise of a lease, may be good?

And ALL THE COURT inclined in opinion, that the devise of a term in this manner to make a perpetuity, cannot be good; for to limit a possibility after a possibility, and to limit the remainder of a term after a dying without issue, stands not with law. But THE COURT would advise.

## CASE 11.

## Jenkins against Young.

Easter Term, 6. Car. 1. Roll 53.

Lands given to a husband and wife, *habendum* to the use of them and the heirs of their two bodies, creates an estate tail.—*Vide* 8 C. 245. *Meredith v. Jouts*, Co. Lit. 271. b. third division of note (1), and the case of *Denn v. Gillot*, 2. Term Rep. 431.

**E**RROR of a judgment in the county of *Flint*. The error was assigned in the matter in law. The case, being adjudged upon a special verdict in an ejectment, was, That 33. Eliz. one *Meredith* gave that land to *Edward Randall* and his wife, *HABENDUM* to the said husband and wife, to the use of them and the heirs of their two bodies; and for default of such issue, to the use of *Edward Morgan* and his heirs.

The question was, Whether the husband and wife have an estate tail, or but for their lives? And it was there adjudged for the plaintiff, that it was an estate tail.

LITTLETON now argued, that it was error; for he alledged, that the estate, out of which the use should rise, was but for their lives; and the use cannot make the estate larger than the limitations: as 3. *Eliz. Dyer*, 186. where land was given to two for their lives, to the use of another for his life, if the lessees die, the use to him to whom it is limited is determined.

But JONES, WHITLOCK, and MYSELF, upon the first motion, conceived, that there is difference where *an estate* is limited to one, and the use to a stranger, there the use shall not be more than the estate out of which it is derived; but not when the limitation is to two, *habendum* to them, to the use of the heirs of their bodies, this is no limitation of the use, nor is the use to be executed by the statute; but it is a limitation of the estate to them and the heirs of their bodies, and they are in by course of common law: and so it shall be taken as a limitation to them and the heirs of their bodies, remainder to the other and the heirs of the other, that the deed may be construed according to the intent of him that made it.—And JONES said, that he had known this to be so adjudged in *Wales* before this time.—Whereupon THE COURT would further advise. *Et adjournatur.*

JENKINS  
against  
YOUNG.

Cro. Jac. 401.  
Gilb. Rep. 17.  
Bac. Uses, ed.  
1785, p. 63.  
Com. 313.  
Skin 209.  
3. Com. Dig.  
333.  
5. Com. Dig.  
625.  
2 Bac. Ab. 262.  
Cowp. 410.

### The King against Maynard.

CASE 12.

INFORMATION for engrossing one hundred bushels of salt to sell again, contrary to the form of the statute of 5. *Edw. 6. c. 14.* Salt is a victual within the statutes against engrossing; but not apples, cherries, plums, or other fruits; nor hops, malt, or any other article used more for pleasure than necessity.

(a). Upon the declaration it was demurred.

NOY and MASON argued, that this information is not maintainable:—FIRST, Because engrossing is no offence in itself, and *forestalling* and *regrating* were not in themselves offences punishable before the statute; nor is *engrossing* in itself unlawful, but by consequence, or by reason of the things bought and made dearer, which ought to be shewn in the indictment or information.

SECONDLY, Because it is not any victual within the words or intent of the statute; for it is not victual, but only *condimentum*, and for preservation of victual: and he cited a record in *Easter Term*, 18. *Eliz.* adjudged, that buying of barley and converting it into malt, and selling it, was no offence punishable in a mayor, who sold it; nor made him to be a victualler (the mayor being prohibited to sell victuals). And 20. *Jac.* adjudged likewise, that hops were not victuals within the statute. And *Pas. 15. Jac. 1. Rot.* 36. adjudged, that buying of apples to sell again was not within the statute. And where it is mentioned 13. *Eliz. c. 25. (a)*, that the statute of 5. *Edw. 6. c. 14.* doth not extend to buying of oils, wine, and other merchandize, except fish and salt, it is to be intended that was not in the point of engrossing, but for forestalling and regrating, which is prohibited: and it would be a great inconvenience if salt should be within the law to be victuals, to be prohibited to be engrossed; for then it should extend to those that carry salt in wains to be sold, and would enforce every one to buy salt by the

(a) Repealed by 12. Geo. 3. c. 71.—See Hawk. P. C. 6. edit. 2vo. p. 482.

THE KING  
against  
MAYNARD.

bushel or peck at ships or salt-pits, which the law never intended; but the law intends those things which are sold in great quantity, usually at every market in every county, as corn, cattle, butter, cheese, &c. : but if any engross all the salt with an intent to sell it at his own price, and at unreasonable prices, he may be thereof indicted as for an offence at the common law; and if it be found, he is finable, as appears by a record in *Easter Term* the 43. *Edw. 3. Roll* 19. shewn in Court,—Whereupon it was adjourned.

## CASE 13.

## Anonymous.

If a *feme sole* plaintiff, after verdict and before the day in bank, take husband, the defendant cannot plead the coverture in abatement.  
Post 236.  
Cro. Eliz. 207.  
Cro. Jac. 323.  
646.  
4. Leon. 15.  
1. Bulst. 5.  
Jones, 367. 411.  
1. Com. Dig. 76.

**T**RESPASS by a plaintiff, being a *feme sole*. The parties being at issue, and tried by *nisi prius*; and verdict for the plaintiff, and damages and costs; the defendant *al jour in banco* pleads, that after the verdict, and before the day, the plaintiff took to husband one J. S. and she being married, demanded judgment, &c.

And thereupon it was moved by ROLLES, that this being a plea arising after the verdict, and before the day *in banco*, cannot be pleaded; but prayed to have it disallowed, and that she should have judgment, for the defendant hath no day to plead it.

THE CHIEF JUSTICE and MYSELF were of this opinion, *ceteris absentibus*,—Whereupon rule was given, that this plea should be outted, and the plaintiff should have judgment, unless other matter should be shewn, &c. *Vide* 4. *Hen. 4. pl. 3.* 21. *Hen. 6. pl. 10.* 21. *Hen. 7. pl. 33.* 5. *Hen. 7. pl. 40.*

## CASE 14

## The King and Barnes against Hill and Windsor.

The 32. *Hen. 8. c. 9.* against buying titles is a public act; but if an informer recite it, and mistake the commencement or conclusion of the parliament, it is fatal.  
Ante, 135, 136.  
Post 522.  
Cro. Jac. 111.  
133.  
Godb. 450.  
Plowd 38. a.  
1 Lev. 296.  
1. ut 140. 1409.  
Dyer, 95. 203.  
Fort. 372.  
Raym 191.  
Strange, 212.  
1. Com. Dig. 231.  
2. Hale, 173.  
1. Hawk. P. C. 555. 2. Hawk. P. C. 350. Ld. Raym. 382.

**I**NFORMATION, upon the statute of 32. *Hen. 8. c. 9.* for buying of titles of one who had not been in possession for one year, nor had any reversion or remainder.

After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment,

FIRST, Because he mis-recites the statute in the date and in the continuance; for he recites it to be at a parliament *inchoat. duodecimo Aprilis*, and continued *usque vicesimo quinto Martii* following, which is a misprision in both: for although the second sessions of the said parliament began the twelfth of *April*, yet the parliament began the twenty-eighth of *April*, 30. *Hen. 8.* and the second session began the twelfth of *April*, 31. *Hen. 8.*; and the continuance by prorogation was not until the 25th of *March*, but until the twenty-fifth of *May*, *et ab inde usque Julii*, and then dissolved. Wherefore for this misprision, although it be a general act, and recited where it needs not to be recited, yet that mis-recital makes it ill.—*Vide Plow. 78.*

BUT ROLLES, for the plaintiff, said, that although the statute is mis-recited, yet it is not material; for he doth not alledge, that it is an offence against the statute *as recited*, for then he had tied it to



the statute recited: but it is alledged, that he bought pretended rights, *contra formam statuti in hujusmodi casu editi prout*. But the record being viewed, it was, that the defendant *statutum prædictum minimum curans*, and relied upon the statute recited; and there is no such statute, &c.

THE SECOND EXCEPTION was, Because it is alledged, that the defendant *Hill* not being seised of such tenements, nor having a remainder or reversion therein, conveyed and granted *tricesimo primo Octobris, quarto Caroli*, those tenements by way of maintenance and champerty to the said *Windsor*; and for confirmation of the said conveyance, the said *Hill* and *Susan* his wife, by fine, in *Hilary Term, 4. Car. 1.* granted the said tenements to *Windsor*, and doth not aver in fact, that it is a pretended right, &c. as he ought to do; for that is the point of the action.

THE KING and  
BARNES  
against  
HILL and  
WINDSOR.

An information  
on 30 Hen. 8.  
c. 9. against  
buying pretend-  
ed titles, must  
aver that the  
seller had a pre-  
tended right.  
Plowd. 87. b.  
Rit. Rcp. 369.  
Dyer, 74.  
3. Bac Ab. 526.

1. Hawk. P. C. 555.

THE THIRD EXCEPTION, Because the value of the land at the time of the fine was 800l.; and he doth not shew what was the value of the land at the time of the bargain of those tenements; and it may be they were of better value at the time of the fine than at the time of the grant; and the grant of them is the offence.

of the bargain. 1. Hawk. P. C. 535.

THE FOURTH EXCEPTION, Because the verdict finds *Hill* and his wife guilty, and the wife was not party to the suit.

And THE WHOLE COURT conceived, that these defaults in the information made it ill, and that the verdict was ill. But they would advise thereupon.

A verdict va-  
riant from the  
record is erro-  
neous.  
2. Hawk. P. C.  
351.

Cowp. 178. 766.

Mathews against Whetton.

CASE 15.

*Hilary Term, 4. Car. 1. Roll 496.*

TRESPASS. Upon a special verdict the case was, A *seme* copyholder for life takes *baron*. The husband makes a lease to one, 25 March, 3. Car. 1. by indenture for a year; by another indenture, dated the same day and year, makes a second lease to the same party for a year, to commence 27th March, after the end of the said first lease; and by a third indenture, bearing date the same day and year, makes a lease to him for a year, to begin the 29th of March next ensuing the end of the second lease; and so betwixt each lease two days, betwixt the beginning of the new lease and the end of the former. The husband afterwards surrenders his copyhold to the lord, who enters, and lets to another for forty years; and afterwards, during the second lease, the first lessee enters, and the lord's lessee ousts him: and if the entry of the lord's lessee be lawful, they pray the discretion of the Court, &c.

ROLLES now argued for the plaintiff. The first question he made was, Whether the first lease be a forfeiture? And he argued, that it should not be a forfeiture; for by the law of the land every copyholder may make a lease for a year without forfeiture; and here is but a lease for one year: and although it may be objected, it is a

A copyholder, by special custom, may make a lease for a year; but if he make three leases together, each to commence within two days after the expiration of the other, it is an evasion of the custom and forfeiture of the estate; and the lord's acceptance of the surrender, not knowing of the forfeiture, will not avoid it.

S. C. Jones, 249.  
1. Roll. Abr.  
1. Brownl.  
1 Term Rep.

508. 510. 3 Co. 51. 9. Co. 75. Cro. Jac. 301. 308. 403. Moor, 372. 539. 569. 1. Brownl.  
131. Co. Lit. 59. 2. note (4). 2. Com. Dig. 5. O. 526, 527. 3. Bac. Abr. 404. 1 Term Rep.

devise

MATHEWS  
against  
WHETTON.

2. Vent. 39.  
Cro. Jac. 301.  
1. Bull. 190.

devise to avoid a forfeiture, and so covinous and fraudulent, which the law will not favour; yet, he said, fraud and practice shall not be intended, unless it be found.

The SECOND QUESTION, Admitting it to be a forfeiture, yet the lord taking a surrender and not entering for the forfeiture, but making a lease for years, his lessee shall not enter for the forfeiture; for the lessee cannot, when the lord allows thereof.

GRIMSTON, for the defendant, argued, that it is a forfeiture; for the three leases being all made at one time, shall be intended one entire contract, and not warranted by the custom; but it is fraud and practice apparent to deprive the lord of his forfeiture: and this covin needs not to be found, as a lease for three hundred years is *mortmain*; and if a jointress within the statute of 11. Hen. 7. c. 10. make a lease by fine for five hundred years, this is a forfeiture as well as an alienation of the freehold of the land, for it is an equal mischief. And he denied, that a copyholder may make a lease for a year by the law of the land and the general custom of the realm; for he ought to have a special custom, otherwise it is not good, unless it be for the trial of a title, which hath been allowed, because it is for reducing a right, and for the lord's benefit.

SECONDLY, He said, Admitting it is a forfeiture; yet the lord's acceptance of the surrender, not knowing of the forfeiture, is no dispensation therewith, and consequently that the lord's lessee hath a good estate and right in him, for which his entry is lawful.

And JONES, WHITLOCK, and MYSELF, were of that opinion. Whereupon a rule was given upon the first argument, that judgment should be entered for the defendant, unless other cause was shewn.— And another day being moved again, RICHARDSON, Chief Justice, being then present, although he at the first doubted on the second point, yet it was adjudged by his consent for the defendant.

## CASE 16.

## Holyday against Oxenbridge.

A private person may justify arresting a common gambler, whom he detects cheating with false dice.

1. Jones, 249.  
1. Roll. 546.  
2. Hawk. ch. 12. s. 20.  
Doug. 359.  
Caldecott's Cases, 291.

TRESPASS of assault, battery, wounding, and evil-intreating, at London, &c. The defendant pleads as to the wounding not guilty. As to the residue of the trespass he pleaded, that *diu ante tempus quo*, &c. the plaintiff, at Bedington, in the county of Surry, *communiter usus fuit* an ill trade called "cheating at play" of divers the king's subjects with false dice, and defrauding them of their money; and for the using of his said ill trade, wandering up and down the country to find out persons inexpert at playing at such games, to deceive them of their money; and in his such wandering the country, to such intents, *tempore quo*, &c. came to the house of Sir Nicholas Carew, at Bedington aforesaid, to find any whom he might, by playing with false dice, despoil of his money; where finding the defendant and one William Arnold in such play unexpert, desired them to play with him in the said house; whereupon the defendant and the said William Arnold, not suspecting any hurt or deceit,

HOLYDAY  
against  
OXENBRIDGE.

deceit, *prædicto tempore quo, &c.* played with the plaintiff in the said house of Sir Nicholas Carew at dice for money (the said Sir Nicholas being in the house, and a justice of peace of the said county); and the said plaintiff playing with the defendant and the said William Arnold with false dice, subtilly conveyed by the plaintiff (divers sums of the defendant's money, *faiso et fraudulenter depredatis*), would presently have departed from the house, and sought to escape; but the defendant knowing certainly that he was deceived by the said false art of cheating with false dice, *prædicto tempore quo, &c. molliter manus imposuit* upon the plaintiff to bring him before the said Sir Nicholas to be examined concerning the said offence; and he examining and finding him upon his examination various and uncertain in his answer; bound him by recognizance to appear at the next sessions for the peace of the county of Surry; at which sessions he appearing, was indicted and convicted of the said offence; which said imposing of his hands and bringing him before Sir Nicholas Carew, for the causes aforesaid, *suit residuum transgressionis prædictæ*; and traverses the trespass in London or elsewhere, except at the said house of Sir Nicholas Carew. Upon this plea the plaintiff demurred.

GERMYN, for the plaintiff, now moved, that the plea was not good; for one cannot without an officer, for any cause, and that upon his own suspicion only, arrest or stay any person unless in felony, especially in his own case.

But ALL THE COURT (the Chief Justice being absent) held the plea to be good; for it shewn, that he was a common cheater, and that he cozened with false dice, and therefore the defendant led him to a justice of peace, being in the same house: and it appears by the plea, that there was good cause of staying him, for he is afterward indicted and convicted of that offence; and it is *pro bono publico* to stay such offenders. And the cause of the said arresting, staying, and bringing him before a justice of peace, being by demurrer confessed to be true, they held it to be a good plea, and that the plaintiff had no cause of demurrer. Whereupon rule was given to have judgment entered for the defendant, &c. Cro. Jac. 498.

Lakins against Sir John Lamb and Holt.

CASE 17.

QUARE IMPEDIT of the church of Segrave, in the county of Northampton. The plaintiff entitles himself by grant of the next avoidance. Sir John Lamb pleads to the issue "*non concessit*," as the plaintiff counts; and issue being joined, it was tried by *nisi prius*. Holt, the other defendant, pleads a plea; whereupon it was demurred. The verdict being found for the plaintiff at the summer assize, and the *postea* being returned at *octabis Michaelis*, the entry was, "*Curia advisare vult*" of the judgment upon the verdict and demurrer: and day was given to the plaintiff and Holt *usque octabis Hilarii*; and then judgment was given for the plaintiff, as well upon the verdict as upon the demurrer. If issue be joined by one defendant, and verdict thereon, and a demurrer by the other defendant, and several continuances entered to the demurrer, a judgment on both is good, although no continuance is entered after the verdict. Ante, 232. Post 380.—Cro. Jac. 528. Cro. Eliz. 489. 1. Bac. Ab. 91.

And



LAKINS  
against  
SIR JOHN LAMB  
and HOLT.

And because no day was given to *Sir John Lamb*, against whom the verdict is found, it was by MR. GRIMSTON assigned for error; for that the judgment not being given the same Term in which the *poslea* was returned, but at another Term, day ought to have been given to all the parties, and therefore it is a *discontinuance*; and discontinuances after verdicts are not aided.

But ALL THE COURT held, it was not any *discontinuance*; for the verdict being found against *Sir John Lamb*, he is out of the court, and no day shall be given to a defendant, against whom a verdict was found; for he hath no day in court to plead any thing: but in this case day is only to be given to the party who is to plead to the demurrer. And divers precedents were shewn here in the Old and New Book of Entries, where the entry is only in such manner; wherefore it was held no error.—Afterwards judgment was affirmed.

## CASE 18.

## Mot and Alice his Wife against Butler.

Trinity Term, 7. Car. 1. Roll 5.

A declaration in slander stating a colloquium of A. and B. and that the defendant said, "A hath stolen my goods, and she (innuendo the plaintiff) was privy thereto," is sufficiently certain.  
Cowp. 276.

**ACTION FOR WORDS.** Whereas there was communication betwixt the defendant and J. S. of one *Sibill Goodwin* and of *Alice* the plaintiff; that the defendant spake these words of the said *Sibill* and the said *Alice*: "SIBILL GOODWIN" (*innuendo* the said *Sibill Goodwin*) "hath stolen away such goods," mentioning what they were; "and she" (*innuendo* the plaintiff) "was privy and consenting thereunto."

After verdict, upon not guilty, and found for the plaintiff, it was moved in arrest of judgment, that the communication being of two, and not specially of *Alice*, but "SHE," *innuendo* the plaintiff, there cannot be any reference to the plaintiff: so the words do not appear to be spoken of her; and the *innuendo* will not help: and cited for that 4. Co. 17 b. *Roberts' Case*.

But THE COURT held, it was certainly and sufficiently alledged; for the words are to be referred *singula singulis*: and when it is said, "*Sibill Goodwin* stole such goods, and SHE (*innuendo* the plaintiff) "was privy and consenting, &c." this word "SHE" cannot be referred to *Sibill*; but to the plaintiff: and for the words, that "she" was privy and consenting to the stealing of the goods," there is good cause of action; for she accuseth her to be accessory. Whereupon it was adjudged for the plaintiff.

## CASE 19.

## Jaxon against Tanner.

Entire damages may be given for different sets of actionable words spoken to different persons at different times.  
Vide post. 328.

Godb. 343.

**ACTION FOR WORDS;** for that he said of the plaintiff, being a merchant, "Thou art a rogue and a beggarly fellow," and I shall prove thee a bankrupt before the next Term;" and for that he said afterwards, upon the same day, to one *John Harris* of the plaintiff, "Trust him not, for he will be thy undoing." The defendant pleaded not guilty; and it was found for the plaintiff, and entire damages given by the jury.

Moor, 141. Cro. Eliz. 329. 788. See 2. Bac. Abr. 7. in notis.

Whereupon

Whereupon it was moved in arrest of judgment by HOLBORN, that these words are alledged to be at several times: and for the words spoken the first time, the action may lie; but for the words spoken afterwards, the action lies not; and damages being entire, there can be no judgment: for the Court shall intend, that damages were given as well for the second as for the first speaking, when both issues are found for the plaintiff; but for words spoken at one time if damages be found, the Court shall intend they were given for the words only which are actionable, and not for the other.

But THE COURT conceived in this case, that the words spoken at the second time are as well actionable as the words of the first, and aggravate the first words; for when he first called him "a bankrupt, and I will prove him a bankrupt, &c." it lies for these words (but not for the words "rogue" or "beggarly fellow"): and when afterwards he said to another, "Trust him not, for he will undo thee," they tend to the same sense. Whereupon judgment was given for the plaintiff, unless other matter were shewn to the Court.—And being another day moved again, RICHARDSON, *Chief Justice*, conceived, there was not any difference betwixt these words, "I will prove thee a bankrupt," and "I shall prove thee a bankrupt by such a time." And he held, that the action well lies for any of the said words.

JASON  
against  
TANNER.

Dougl. 377. 730.  
3. Term Rep.  
433. 779.

### Facy against Long.

CASE 20.

**PROHIBITION.** A question was moved, Whether tithes shall be paid for the depasturing of sheep for one's family only, and not to be sold? For the prescription was, that he paid the tenth pound of wool of all sheep sold there and depastured.

But MAYNARD moved, that notwithstanding the payment of the tenth fleece, he should pay for the pasturage of his sheep eaten in his house.

But ALL THE COURT held, that tithes shall not be paid for any cattle eaten in the family, no more than for any cattle reared for pail or plough: and a precedent was cited in *Hilary Term, 9. Jac. 1.* that so it was resolved.

Cro. Eliz. 446. 476. Cro. Jac. 430. 376. Hard. 184. 5. Bac. Ab. 55, 56. 3. Bunb. 90. 313. Gilbert's Rep. in Equity, 231.

Tithes shall not be paid for cattle reared for the sustenance of the family, nor for cattle reared for the pail or plough.

S. C. Jones, 254.  
S. C. 1. Roll. Ab. 647.

Win. 33.

2. Inst. 561.

Moore, 909.

Com. Dig. 97.

### Margaret Hinde against The Bishop of Chester.

CASE 21.

**PROHIBITION:** Because the defendant sued in the consistory court of *Chester*, before the commissary there, for a MORTUARY, after the death of *William Hinde*, a priest of the said diocese; surmising, that by custom there he ought to have for a mortuary, after the death of every priest dying within the said archdeaconry of *Chester*, the best horse or mare, his saddle, bridle, spurs, his best gown or cloak, his best hat, his best upper garment under his gown, his tippet, his best signet or ring, as to the bishop *de debito consuet. fore supponitur* (a); and recites the statute of 21. Hen. 8. c. 6. concerning mortuaries. And she avers, that there is no such cus-

(a) By 23. Geo. 1. c. 6. this mortuary settled upon the bishop in its stead. 2. Bl. is directed to cease; and an equivalent is Com. 426.

By 21. Hen. 8. c. 6 the bishop of Chester was entitled to a mortuary on the death of every priest dying within the diocese.

tom

HINDS  
against  
THE BISHOP OF  
CHESTER.

tom there; and that she had paid a mortuary to the parson of *Bum-berry*; and that after a prohibition the defendant had prosecuted his suit there.

NOY, *Attorney General*, moved, for the defendant, that consultation should be granted.

Upon a suit in the spiritual court for a mortuary by custom, if the defendant plead "no such custom," and the Court refuse the plea, a prohibition shall go.

2. Mod. 268.  
12. Co. 76.  
2. Inst. 491.  
4. Com. Dig. 506.  
Doug. 378.  
1. Term Rep. 552.  
3. Term Rep. 3.  
H. Bl. Rep. 100.

THE FIRST QUESTION was, This suit being for a mortuary in the archdeaconry of *Chester*, and the doubt, whether there were a custom in that place to have such things for a mortuary, Whether this be just cause of prohibition; or, that this suit being for a mortuary, is merely triable in the spiritual court? And it was alledged on the defendant's part, that this is merely triable in the spiritual court upon the statute of *artic. cleri*; which saith, that where a suit is for a mortuary, prohibition shall not be granted: and in *Fitz. Nat. Brev.* 53. & 51. 10. *Hen.* 4. 2. where custom is alledged for the payment of a mortuary, it is said this custom is triable in court christian: and 13. *Rich.* 2. "*Jurisdiction*," 20. *Kellaway*, fol. 110. where suit is for a mortuary, consultation shall be awarded.—But CALTHROP, for the plaintiff, moved against it, and said, True it is, before the 21. *Hen.* 8. c. 6. if there were a suit in court christian for a mortuary, consultation should be granted, *vide Doct. & Student*, fol. 176. and the *Book of Entries*; but the course is otherwise since that statute.

After a declaration in prohibition, consultation shall not be granted upon motion before plea or demurrer.

11. Co. 41.  
Hob. 192.  
Yelv. 79.  
B. R. H. 292.  
Cowp. 424.

BUT as to THE SECOND QUESTION, Whether consultation shall be granted upon a motion, without answering to the prohibition? (and that was moved by NOY, That it shall, because the suit being for a mortuary, there is no cause of prohibition; therefore consultation should be granted;)

JONES and WHITLOCK, *Justices*, were of opinion, that a prohibition ought not to have been granted, it being a suit for a mortuary: and although it was alledged it is now grantable upon the statute of 21. *Hen.* 8. c. 6. they conceived, that by the proviso therein mortuaries shall be paid in the archdeaconry of *Chester*, as before they have been accustomed; so it is out of the statute: and the custom for the payment of mortuaries being in question, is triable in court christian: and although prohibition hath been unduly granted, yet it is no discretion in the Court to grant a consultation upon motion without answering.

But RICHARDSON, *Chief Justice*, and MYSELF held, that no consultation ought to be granted: for the surmise in the prohibition is good; and there is no such custom to have such goods for mortuaries, as is surmised; and that may well be tried by the course of the common law: for now the statute appoints what shall be paid for mortuaries; and that in the said places, in *Wales* and the archdeaconry of *Chester*, such mortuaries shall be paid as have been accustomed, which is issuable and triable at the common law; especially as this case is, wherein the plaintiff pretends and surmiseth, that she paid the mortuaries to the parson of *Bum-berry*, in which parish the said priest inhabited; and that there is no such custom she should pay it to the archdeacon.

SECONDLY, We held, as this case is, no consultation ought to be granted upon motion, without answering to the prohibition: because the plaintiff in her declaration upon the prohibition shews that



that the defendant hath sued after the prohibition, which is a contempt, and ought to be answered; but peradventure in some cases, when the prohibition appears in itself to be unduly granted, the defendant before appearance having committed no contempt in prosecuting thereof, may move to have a consultation: whereupon it was appointed that the defendant should plead or demur, and then the Court would give judgment upon the record before them, &c.

HIND  
against  
THE BISHOP OF  
CHESTER.

## Mills against Mills.

CASE 221

**A**CTION on the case, in the nature of a conspiracy. Whereas An action on the case in the nature of a conspiracy will lie against one defendant only, the defendant with *J. S. falso et malitiose* conspired to procure him to be indicted of such a felony; that the defendant *falso et malitiose* such a day procured him to be indicted, whereby he was much vexed, &c. After verdict, in arrest of judgment, LITTLETON moved, that this action lies not, because he did not sue the other as well as the defendant; for conspiracy ought to be against two.—*Sed non allocatur*; for an action on the case may well be against one of them — Whereupon it was adjudged for the plaintiff.

F.N.B. 14. 116.  
Carth. 416.  
1. Roll. Ab. 111.  
Cro Jac. 194.  
3. Mod. 220.  
Term Rep. 231.

Str. 144. 193. 1227. 1. Wils. 210. 12. Mod. 209. 1. Hawk. P. C. c. 72. l. 8. 2. Term Rep. 231.

## Walsh against Bishop.

CASE 23.

Hilary Term, 6. Car. 1. Roll 954.

**E**RROR of a judgment in the common pleas, in trespass of battery against two. They plead several pleas, the one *not guilty*, the other a *justification*; whereupon several issues were joined, and the jury found both issues for the plaintiff, and assess several damages, both found for the plaintiff, he entered against the one, which was entered accordingly; and takes judgment against the other for the damages found against him, and the costs.

In battery against two, if they plead several pleas, and both found for the plaintiff, he may enter *nolle prosequi* against one, and take judgment against the other.—*Vide*

S. C. post. 243.  
2. Roll. Ab. 101.  
Hob. 70. 180.  
Carth. 19.  
3. Mod. 101.  
2. Lev. 33.  
2. Com Dig. 621.  
1. Wils. 89.  
1. Burr. 358.  
Doug. 169.  
3. Term Rep. 511.  
H Bl. Rep.  
C. B. 108.

LITTLETON assigned for error, Because a *nolle prosequi* against the one before judgment entered is *quasi* a release to him, which shall enure to the other, and abate the writ for both; but if he had prayed judgment against the one, and had it, then he might enter a *nolle prosequi* against the other. And that entry of a *nolle prosequi* against the one after judgment shall not abate the writ, nor be a release to the other; and for that was cited 14. *Edw. 4. pl. 6.*

But MR. GRIMSTON answered; that this *nolle prosequi* is not a release in itself, but an acknowledgment that he will not proceed as against the one; which the plaintiff may well do in trespass, where the defendants sever themselves by pleading, and there be several verdicts against them: and so there be divers precedents where *nolle prosequi*'s are entered as well before judgment as after; and so in the Old Book of Entries.

THE COURT thereupon would advise (a).

(a) It was moved again in Hilary Term, and the judgment of the common pleas affirmed. Post. 243.

Mounson

## CASE 24.

## Mounson against Cleyton.

Trinity Term, 6. Car. 1. Roll 1343.

If a man taken in execution be rescued, the plaintiff may have a new *ca. sa.* or a *scire facias* on the judgment.

Ante, 75. 109. 153.

29. Aff. pl. 41.

3. Co. 44. 52.

Moor, 57. 354.

F. N. B. 246.

Hobart, 60.

Yelv. 52.

Cro. Eliz. 478.

Cro. Jac. 486.

2. Jones, 21. 97.

1. Vent. 269.

Lutw. 1266.

1. Show. 174.

249.

Carth. 212.

3. Com. Dig.

185.

**SCIRE FACIAS** to have execution upon a judgment in debt.—The defendant pleads, that at another time the plaintiff had sued execution by a *capias ad satisfaciendum*; and the defendant was taken in execution. The plaintiff replies, that true it is he sued a *capias ad satisfaciendum*, and the defendant was taken thereupon; and he presently rescued himself and escaped.

The defendant demurs thereupon.

And ALL THE COURT conceived, that the replication was good: for the plaintiff, not having the fruit of his execution, may have a new execution; and it is not reason the defendant should take advantage *de son tort demesne*: and as there is no cause for the defendant to have an *audita querela* when he is escaped and taken again, unless it be for a voluntary permission by the sheriff; so there is not any bar for him to have new execution: and although it is no good return upon a *capias ad satisfaciendum*, that the defendant rescued himself (for the sheriff at his own peril ought to have kept him), nor any plea in debt upon an escape, yet the party himself shall never take advantage of his own tortious act. And as it was said, that it appears the plaintiff might have his remedy as well against the sheriff as against the defendant; so it was answered, that doth not take away his remedy against the party who escaped, unless the defendant shews that the plaintiff had sued the sheriff and recovered against him; and it may be the sheriff here is dead, and then no power to sue his executors.—Wherefore, it appearing that the remedy remains against the party himself, rule was given that judgment should be entered for the plaintiff, unless, &c.

See 8. & 9. Will. 3. c. 27.

## CASE 25.

Wells, Administrator *durante minore etate* of J. S. against Some.

In an action by an administrator *durante minore, &c.* a general averment that he was under age is sufficient after verdict.

2. Roll. Rep.

466.

Lutw. 632.

**ACCOUNT** against the defendant as bailiff and receiver; and shews only that he was bailiff of such a manor, &c. The defendant pleads to the issue; and found against him: and it was moved in arrest of the judgment.

THE FIRST EXCEPTION taken was, Because he doth not shew that J. S. is within the age of seventeen years; and it may be he is under age, and yet above the age of seventeen years.—*Sed non allocatur*; for it shall not be intended, unless it be shewn, that he was above the age of seventeen years when the other had admitted him to bring the action, and pleaded to the issue.

THE SECOND EXCEPTION, that the declaration is not good, was, Because he charges him by the name of bailiff and receiver; and afterwards doth not shew any charge against him as receiver.—*Sed non allocatur*: for it is the more for the defendant's benefit. Whereupon it was adjudged for the plaintiff.

Account by an administrator *durante minore etate* against a bailiff and receiver is good, without shewing any charge against him as receiver.—5. Co. 19 a. Cro. Eliz. 602. 5. Mod. 395. 2. Vent. 378. Brownl. 46. Yelv. 128. Lut. 632. 2. Roll. Rep. 466. 2. Sid. 40. 60. Hob. 251. 1. Bac. Ab. 9. 2. Bac. Ab. 385.

## Hilary Term,

7. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir James Whitlock, *Knt.*

Sir George Croke, *Knt.*

Thomas Noy, *Esq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

### Milles against Milles.

CASE 1.

**A**SSUMPSIT; for that the defendant, in consideration of marriage, promised to the plaintiff twenty pounds, to be paid in manner and form following, *viz.* ten pounds *Michaelmas* 1631, and ten pounds residue at *Michaelmas* 1632; and for the nonpayment of the first ten pounds he brings the action.

The defendant pleads *non assumpsit*; and found against him, to his damages twenty pounds, and costs two pounds thirteen shillings and fourpence,

And it was moved by MR. GRIMSTON in arrest of judgment,

FIRST, That the action lies not till after *Michaelmas* 1632; and compared it to an action of debt grounded upon a single bill for ten pounds to be paid, *viz.* five pounds at our *Lady-day*, and five pounds at *Michaelmas*; debt lies not until the last day.

SECONDLY, Here are damages given for the last day, which is not yet come.

But JONES, WHITLOCK, and MYSELF (RICHARDSON, *Chief Justice*, being absent) agreed, that the action well lies before the last day, being an action upon promise or covenant: for the breach is immediately for the first ten pounds not being paid at the day; and for this breach the action well lies. But we held it to be otherwise in debt, the contract or bill being entire.

SECONDLY, We agreed that the damages of twenty pounds shall be intended given for the first ten pounds, and that he should have so much damages for non-payment thereof only, without any respect to the ten pounds which is not yet due (*a*).—Whereupon it was adjudged for the plaintiff.

(a) *Sed vide* Cro. Jac. 505.

### Cooks against Douze.

CASE 2.

**E**RROR of a judgment in *Winton*: where the plaintiff declared, That he lent to one *Wheeler* twenty pounds at the defendant's request, and that the defendant, in consideration the plaintiff would rest content and forbear the said money *per paululum tempus*, promised upon request he would pay; and alledges in fact, that he forebore *per paululum tempus*, and required payment; and the defendant had not yet paid, although he required payment at such a day.

After *non assumpsit* pleaded, and verdict and judgment given for the plaintiff, it was assigned for error, That to forbear *per paululum*

On a contract to pay a sum of money at different instalments as *assumpsit* will lie on non-payment of the first instalment; and damages are no bar to a second action; but it is otherwise in debt.

*Sed vide* Willf. 82.  
Byer, 115.  
Co. Lit. 292. b.  
Owen, 42.  
Moor, 13.  
Bendl. 57.  
4. Co. 94. b.  
1. Roll. Ab. 29.  
Cro. Eliz. 118.  
776.  
2. Leon. 107.  
Lit. Rep. 61.  
Rost. 350.  
Andr. 370.  
1. Com. Di 107, 108.  
3. Bac. Ab. 711, 712.

A promise in consideration of forbearance *per paululum tempus*, is good. *Sed vide* post. 273. 438.  
1. Leon. 61.  
1. Sid. 45.  
Cro. Jac. 250.  
685.  
1. Com. Dig. 168.



COOKS  
against  
POUZE.

*tempus* is not any consideration, because there is not any certainty therein.

FOSTER said, there were divers precedents that it hath been adjudged to be ill.

BUT ALL THE JUSTICES, *absente* RICHARDSON, held, that it was well enough: for when the money was lent to *Wheeler*, and long forborn, and the plaintiff upon the defendant's request agreed for a longer time, and to accept of the payment from him when he should be required; and alledges in fact, that he forebore until the day of his action, and that he requested, &c. it is sufficient. Whereupon rule was, given that judgment should be affirmed.

CASE 3.

Berry against Heard.

Hilary Term, 13. Car. 1. Roll 1444.

If a stranger cut down a timber-tree during the continuance of a term, the lessor may maintain *trover* against him for it.—And *quare*, If he may not, at his election, have *trover* or *waste* against the lessee?

Jones, 255.  
2. Roll. Abr. 119.  
Bendl. 141.  
11. Co. 81. b.  
Post. 274.  
Moor, 19.  
Allen, 82.  
1. Com. Dig.  
218, 219. 601.  
3. Peere Will.  
267.  
1. Term Rep.  
54.

**ACTION OF TROVER AND CONVERSION** of a load of bark or rind of oak. Upon not guilty pleaded, a special verdict was found, that this bark was the bark of an oak, being timber growing in such land, whereof the plaintiff was seised in fee, and had let the land whereupon the tree grew to *J. S.* for years; and that the defendant during the said term, which yet continues, entered and cut down the said tree, being a timber-tree, and carried away the said load of bark thereof, and converted the same to his own use. And if, &c.

The sole question herein was, If a stranger cut down a timber-tree in the time of lessee for years, and carry that or the bark thereof away, Whether the lessor during the said term may have an action of *trover* for it, or be put to take his remedy against the lessee by action of *waste*; and the lessee to have his remedy by action of *trespass* or *trover* against him who cut it down? or, Whether the lessor, at his election, may punish the one or the other?

This case being long depending, and divers arguments therein before I came to the bench, and the Judges differing in their opinions, it was argued after I came to the bench.

JONES and WHITLOCK said, that they always were of opinion, that the action well lies for the lessor, and that he hath election to sue the lessee for the waste, or him who cut down the tree; for the tree being timber, the general property is always in the lessor notwithstanding his lease; and the lessee for years hath but a special property therein, to have the shadow and fruits thereof as long as it is growing, and not otherwise: and when it is severed from the land, the property which the lessee had therein is lost; and then the property thereof is only to the lessor (*a*), so as he may have an action for the carrying it away, or an action of *trover and conversion*; and that such property which he hath by the common law always remains in him, notwithstanding the statute of *Gloucester*, which gives him the action of waste to punish such cutting down. And they said, that LEE, *Chief Justice*, was of their opinion; but that DOPERIDGE was always of the contrary. And they said, a rule was once given that judgment should be given for the plaintiff; and they marvelled it was not entered.

(a) See the case of *Bewick v. Whitfield*, 3. Peere Will. 267. Co. Lit. 220. note (1) Moor, 327. 11. Co. 84. 1. Roll. Ab. 183.

And

And now RICHARDSON, *Chief Justice*, said, he was of their opinion, that the property of the timber-tree, when it is cut down, is no longer in the lessee: for his interest is in it only during the time it is growing upon the land, and that afterwards it remains only in the lessor, so as he alone shall have an action of *trover* for the carrying it away.

But I was always of the contrary opinion, that the lessee solely during term ought to have an action for the carrying away of it, and not the lessor; for the possession and property is vested in him during the term, and is not lost by his cutting down, nor by the cutting down of a stranger; and that he is chargeable in an action of waste to answer treble damages to the lessor; and so the lessor having sufficient remedy, it is reason the lessee should have the action against him who cuts it down and carries it away, to have recompence; and the recovery by the lessor in an action of *trover* is no bar for the lessee to plead in an action of waste: nor is it reason a recovery of single damages against him who cut down the said timber should be a bar in waste, where he is to recover treble damages; therefore the lessor during the term ought to have his remedy only against the lessee, and he over against him who cut down the said tree. But notwithstanding, upon their three opinions, it was adjudged for the plaintiff. See 4. Co. 62. 5. Co. 76. 11. Co. 48. & 81. Dyer, 90. 44. Edw. 3. pl. 5. 10. Hen. 7. pl. 2. Co. Lit. 220. a.

BRETT  
against  
HEARD,

Co. Lit. 54. 2.

### Walsh against Bishop.

CASE 4.

Vide ante, 239.

THIS Case was now argued again by LITTLETON, Recorder of London, for the plaintiff in the writ of error, and by HENDEN, Serjeant, for the defendant. The errors insisted upon were,

FIRST, That the jury ought not to have given several, but joint damages.

SECONDLY, That the entry of a *nolle prosequi* before judgment is quasi a confession of his action to be false against one, or a release to him, which being before judgment is, as it were, a release to both,

But THE COURT, *absente* JONES, conceived, that there was not error in either of them: for, FIRST, when the plaintiff hath relinquished his suit against the one, although in truth there ought to have been inquisition but once of the damages, and not severally, yet it is not material when no advantage is taken thereof. And as to the SECOND, it is not a confession that this writ is false, nor an absolute release to the one, but it is, as it were, an agreement that he will not proceed against the one; and his acknowledgment is an absolute bar as to him, and proceeding may be against the other: as if one pleads a plea, and there is a demurrer thereupon, and the other pleads to the issue, and it is tried, it is an usual course to enter a *nolle prosequi* against him who pleaded the plea whereupon the demurrer was, and to pray judgment against the other; so where they sever themselves by several pleas, he may enter a *nolle prosequi* against the one, and have his judgment against the other. And divers precedents being shewn on both sides, that such judgments have been so entered, the judgment was affirmed. Vide 18. Edw. 4. pl. 26. 5. Hen. 5. pl. 1. The Book of Entries, 585. 589. 5. Hen. 7. pl. 24. 11. Hen. 7. pl. 5.

In trespass  
against two, if  
a joint verdict  
and several da-  
mages be given,  
the plaintiff may  
enter a *nolle pro-  
sequi* as to one,  
and sign judg-  
ment against  
the other.

Ante, 239.  
11 Co. 7. 4.  
Cro. Car. 55.  
551.  
Hob. 70.  
Cro. Eliz. 869.  
Carth. 19.  
Salk. 457.  
Will. 89.  
Strange, 910.  
1140.  
2. Com. Dig.  
621.  
5. Com. Dig.  
89.  
Doug. 167.  
note (56).  
3. Term Rep.  
511.  
H Bl Rep.  
C. B. 108.

Copland

## CASE 5.

## Copland against Pyatt.

Trinity Term, 6. Car. 1. Roll 687.

Lands conveyed to the use of husband and wife, and the heirs of her body by the father of the wife, in consideration of the marriage, and of a sum of money paid by the father of the husband, is not a jointure within the restraint of the 11. Hen. 7. c. 20 upon the death of the husband without issue.

8. C. Jones, 254.  
Piggot, 80.  
Plowd. 464.  
Dyer, 64. b.  
Hob. 332.  
Cro. Eliz. 2.  
Cro. Jac. 475.  
2. Inst. 681.  
Palm. 21. 32.  
216.  
W. Jones, 13.  
12. Mod. 512.  
2. Bac. Ab. 92.  
in notis.  
Mr. Butler's note (1) Co. Lit. 373. and Co. Lit. 365.  
3. Com. Dig. 71.  
Cruise on Re- cov. 155.

**EJECTMENT.** Upon a special verdict the case was, That *William Bertram* seised in fee, having three daughters, by indenture betwixt him and *Robert Bagley*, in consideration of four hundred pounds paid by the said *Robert Bagley*, and in consideration of a marriage had betwixt *Robert Bagley*, son and heir of the said *Robert Bagley*, and *Margaret* eldest daughter of the said *William Bertram*, covenanted and preferment of the blood of the said *William Bertram*, covenanted to stand seised to the use of the said *Robert* the son and the said *Margaret* his wife, and the heirs of her body; and for default of such issue, to the use of his other daughters, and the heirs of their bodies, the remainder to the heirs of the said *William*. The husband dieth having no issue, and *Margaret* his wife by fine conveys it to the defendant, upon whom the issue entered, as for a forfeiture by the statute of 11. Hen. 7. c. 20.

The question was, Whether it were a forfeiture or not?

And IT WAS RESOLVED, that she was not a jointress within that statute, notwithstanding the four hundred pounds paid by *Robert Bagley* the father; for the land first moved from *William Bertram* the wife's father, and the preferment of the blood of *William Bertram* shews the intent, that the husband's heirs should not be preferred, but the wife's; for the meaning of the makers of that law was only to disenable women who have any estate in dower, or for life, or in tail, jointly with their husbands, or only to themselves, of the inheritance or purchase of their husbands, or given to them by the ancestors of their husbands, or other persons seised to the use of such husbands or their ancestors, when they become sole, or with any other after-taken husband, from making such alienations, whereby the heirs of such husbands might, and before the making of that law, were frequently disinherited. But in this case the advancement is by the ancestors of the wife, and is not of the purchase of the husband or his ancestors, nor assured by the husband or his ancestors. And in this case *The Bishop of Exeter's Case* was cited, who, in consideration of kindred to the woman, and service done by the man, gave certain lands to them in tail: and it was adjudged, that the wife, after the death of the husband, had no estate within the said statute of 11. Hen. 7. c. 20. and that she might sell it, because the land came not from her husband nor any of his ancestors, nor from any seised to the use of her husband or his ancestors. And therefore it was adjudged for the defendant. *Vide Ware v. Walthew (a)*, *Kinaaston v. Lloyd (b)*, and *Kirkman v. Thompson (c)*.

(a) Cro. Jac. 173. to 176.

(b) Cro. Jac. 624.

(c) Cro. Jac. 474.

## CASE 6.

## Meredith against Joans.

Easter Term, 6. Car. 1. Roll 53.

A limitation in the habendum of a deed to the use of the grantee and the heirs of their bodies, is an estate tail. Ante, 230, 231. Jones, 253. 9. Co. 47. Cro. Jac. 401. Co. Lit. 19. 1. Co. 122. 2. Co. 78. 2. Roll. Ab. 780. 3. Bulst. 184. Com. Rep. 29.

**ERROR** of a judgment in *Flintshire*. The error was assigned in point of law, viz. That judgment was given there upon a special



special verdict for the plaintiff, where it ought to have been for the defendant. The case was, land was given to husband and wife, *habendum* to husband and wife to the use of them and the heirs of their bodies. The question there was, Whether it were an estate for life only, or an estate tail? And it was adjudged to be an estate tail.

LITTLETON, Recorder of London, now argued for the plaintiff in the writ of error, and CALTHROP for the defendant.

And ALL THE COURT, *absente* RICHARDSON, held, that the judgment ought to be affirmed; for they conceived, that this limitation in the *habendum*, "to the use of the grantees and the heirs of their bodies, is as a limitation of the land itself, being all to one person, and is as if it had been said, "*habendum* to them and to the heirs of their bodies;" and not like to the case 2. & 3. Eliz. Dyer, 186, for true it is, when the estate is limited to one or two, to the use of others and their heirs, the first estate is not enlarged by this implication, and the use cannot pass a greater estate. But here when the grant and *habendum* convey the estate, and the limitation of the use is to the same person, that shews the intent of the parties, and is a good limitation of the estate; for it is not an use divided from the estate, as where it is limited to a stranger, but the use and estate go together; wherefore it is all one as if the limitation had been "to them and the heirs of their bodies." And JONES said, that he knew many conveyances had been made in this manner, and twice brought in question. And adjudged to be an estate tail. Whereupon judgment was affirmed.

MARSDEN  
against  
JOHNS.

### Swayn and Others against Stephens.

CASE 7.

Hilary Term, 6. Car. 1. Roll 1243.

TROVER AND CONVERSION of a ship and nine pieces of ; and declares, that 1 March, 21. Jac. 1. he was possessed of, and the same day lost, them, which came to the defendant's hand, who, 3 October, 3. Car. 1. converted them to his proper use. The defendant pleads the 21. Jac. 1. c. 16. of Limitation of Actions; and that the 20 March, 19. Jac. 1. *causa actionis accrevit*; so as not only three years and more are incurred since the parliament, but also six years, after the conversion, before any action commenced: *et hoc, &c.* The plaintiffs reply, that they were possessed of the said ship as of their proper goods, and so being possessed before the 20 March, 19. Jac. 1. viz. 1 March, 19. Jac. 1. they agreed at London aforelaid, in *parochia et warda predicta*, that the said defendant, as their servant, should transport the said ship and goods to T. in Spain, being parts beyond seas, and should afterwards restore them to the plaintiff upon request; whereupon the defendant taking the said ship the said 1 March, 19. Jac. 1. transported her to the parts beyond seas, viz. to T. and 20 March, 19. Jac. 1. there sold the said ship and goods to persons unknown, and converted them to his proper use: and that the defendant, after the said conversion, remained in *partibus transmarinis usque* 1 May, 1. Car. 1. by reason of which stay they could not sue him *per legem terræ*: and that 1 May, 1. Car. 1. he returned;

In trover and conversion the plaintiff may reply, to a plea of the statute of Limitations, that the defendant transported the goods beyond the sea by consent, and that he afterwards converted them to his own use, and remained in parts beyond the seas, by reason of which the plaintiff could not sue him.

S. C. Jones, 251.  
2. Term Rep.  
462. 25. 156.

CRO. CAR.

R

returned;

SWAYN and  
Others  
against  
STEPHENS.

Trover is an  
action within  
the statute of  
Limitations.  
Post. 333.

Jones, 252.

3 Mod. 111.

3. Bac. Ab. 513.

*Quere*, If the  
statute of Limi-  
tations operates  
while a debtor  
is abroad?

1. Lev. 143.

Carth. 136.

3. Mod. 312.

Show. 99.

2. Vern. 694.

Willf. 134. See 5. Com. Dig. 533.

Request and  
non-delivery of  
goods sold  
abroad is a new  
conversion of  
them when the  
defendant comes  
to England.  
*Vide post.* 334.

A variance in  
the replication  
from the decla-  
ration in an im-  
material matter  
is no departure.

5. Com. Dig.

99. 102.

(b) This Case  
was moved  
again in *Mi-  
chaelmas Term*,

returned; whereupon the first of *October*, 3. Car. 1. at *London*, they required him to deliver the said ship and goods, which to do he refused, but the said ship and goods, *ad tunc et ibidem*, converted and disposed *prout superius continetur: et hoc, &c.* And upon this replication the defendant demurs.

HENDEN, *Serjeant*, moved, that this action of *trover* is not within the statute, but is omitted; for although at the first the words be, "actions of debt, detinue, actions upon *trover*, account, &c. shall be brought within the time after limited," yet in the perclose, actions of *trover* are not mentioned. But ALL THE COURT conceived, although actions of *trover* are not mentioned in the perclose, yet the words being, that "actions upon the case shall be brought within six years, and actions for words within two years," in those general words of "actions upon the case" the action of *trover* is implied; wherefore it was not allowed.

SECONDLY, Admitting the defendant was beyond seas for six years after the conversion, and did not return into *England*, the question was, Whether the plaintiff had not liberty to bring the action at any time within six years after his return? for the proviso is on the part of the plaintiff, if he be over the sea at the time of the cause of action, that he shall have time after his return; and, by the same equity, it shall be so where the defendant is over the seas and cannot be sued.—But that point THE COURT did not resolve (a).

THIRDLY, If this request and non-delivery after his return be not a new conversion and cause of action, so that although he was barred before the statute of Limitation, Whether he should not be hereby restored to that action? And JONES and WHITLOCK conceived that he should, and that it may be well intended the goods came again to his hands after his sale, and the demanding them of him, and his denial and conversion, is good cause of action. But I doubted thereof.

FOURTHLY, It was urged, that here the replication was a departure from the declaration: for by the declaration the plaintiffs suppose a casual loss and a *trover* by the defendant 1 *March*, 21. *Jac.* 1. but in the replication they suppose an agreement to transport the said ship and goods, and afterwards to restore them to the plaintiffs, and that the defendant sold and converted them to his own proper use the twentieth of *March*, 19. *Jac.* 1. and so a variation between the declaration and replication in the time and manner how the defendant had them. Also, by his own confession, the conversion was made above six years before the action brought (b).

9. Car. 1. and judgment entered for the plaintiff. Post. 335.

(a) By 4. Ann. c. 16. s. 19. if any person, at the time any such cause of action shall accrue, shall be beyond the seas, the person intitled to the action shall have the same times as are respectively mentioned in the statute, after the return of such person from beyond the seas.

Soutler

## Soutley against Price.

CASE 8.

Hilary Term, 5. Car. 1. Roll 1276.

**A**N APPEAL OF MURDER was brought by writ awarded to the sheriff of *Salop*, being the next county adjoining to that of *Montgomery* in *Wales*, for the murder of her husband at *Montgomery*, in the county of *Montgomery*; and, on not guilty pleaded, it was tried by a jury of the county of *Salop* at the bar, the murder being foul, and the defendant found guilty.

It was moved in arrest of judgment, that this writ of appeal ought to have been brought in the county of *Montgomery*, where the fact was committed, and not in any other county adjoining.

It was several times argued at the bar by HENDEN and BERKLEY, Serjeants, and LITTLETON, for the plaintiff, and by CHARLES JONES, Serjeant, LLOYD, and others, for the defendant.

ALL THE COURT resolved, that the writ should abate; for it is against a fundamental rule of law, that a trial for murder, by appeal or otherwise, should be out of the county where it is committed; as 18. *Edw.* 3. pl. 32. 11. *Hen.* 4. 98. & *Stamford*, 9. And for this cause it was doubted at the common law, where a stroke was given in one county, and death ensued in another county, How it should be tried? And to avoid this doubt the 2. *Edw.* 6. c. 24. was made. But it always was clear, that a fact in one county ought not to be tried in another: and although it hath been objected, there would be otherwise failure of justice, because in *Wales breve domini regis non currit*; and this appeal is *quasi* for the king, and where the king is party he may always sue in any county adjoining, as in *quare impedit* for an advowson in *Wales*, because there they cannot write to the bishop (a); yet it was answered, that *Wales* was a realm by itself and distinct from the government of *England* (b), but afterwards united, and by the statute of *Rutland* appointed by what laws it shall be governed, and by the 27. *Hen.* 8. c. 26. and 34. *Hen.* 8. c. 6. divided into counties, and expressly therein is set down how appeals shall be sued there out of chancery, and ought not to be tried here by writs of appeal. But if he were here in *custodiâ mareschalli*, Whether he should be sued here by bill of appeal? they would not now resolve.

It was also objected, that writs of appeal have been brought here for murder committed in *Sandwich*, which is within the *Cinque Ports*, *ubi breve domini regis non currit*, the writ supposing the murder to be committed at *Sandwich* in the county of *Kent*; and the defendant pleading that *Sandwich* was one of the *Cinque Ports*, upon demurrer the writ hath been adjudged good (c); and that so it should be here.

THE COURT answered, There was a manifest difference betwixt the cases; for there the appeal was brought within the county of

An appeal of murder committed in *Wales* must be tried in the county where the fact was committed, and not in the next adjoining English county.

Staundf. 63.  
Fitz. Forf. 14.  
Dyer, 18. 46.  
1. Hale, 157.  
2. Hale, 163.  
1. Hawk P. C. 119.  
2. Hawk, ch. 23. f. 35.  
2. Inst. 557.  
Cro. Jac. 692.  
12. Co. 61.  
1. Com. Dig. 119. 121. 366.  
5. Com. Dig. 667.  
Doug. 791.  
2. Term Rep. 125.

(a) Jones, 255.  
5. Com. Dig. 665.

To an appeal for murder committed at *Sandwich* it cannot be pleaded in abatement that *Sandwich* is one of the *Cinque Ports*.  
Post. 253.  
S. C. Yelv. 12.  
1. Hale, 157.

(b) See THE YEAR-BOOK, 11. *Hen.* 6. (c) *Crisp v. Verral*, Cro. Eliz. 910. Yelv. 12.

Kent,



SOUTLEY  
against  
PRICE.

Sed vide Rex v.  
Morris, 1. Mod.  
64. and 68. and  
the cases there  
cited.

*Kent*, and it was truly supposed done at *Sandwich*; for the *Cinque Ports*, though they are a liberty made by act of parliament, yet they always remain parcel of the county, and so the appeal well brought; but here, by the plaintiff's own shewing, the act was done in another county out of the county of *Salop*, wherefore the appeal lies not.

THE COURT also much relied on this, that no precedent can be shewn where appeals have been allowed in counties adjoining for murder committed in *Wales*. It is true, that in this court a writ of appeal was brought against one *Thomas (a)*, in the county of *Salop*, for murder in the county of *Montgomery*; *sed nihil inde venit*. But divers precedents were shewn to the contrary, viz. one in *Trinity Term*, 5. *Edw. 3. Roll 9.* where an appeal was brought here for a fact in *Wales*, the judgment was, that for that cause *eat inde sine die*; and *Trinity Term*, 18. *Hen. 6. Roll ultimo*, an appeal of rape was brought here for a fact in *Wales*, and adjudged, that he shall not be put to answer, because it was committed in *Wales*. And two other precedents were produced, the one in *Easter Term*, 10. *Edw. 2. Roll 110.*; the other in *Easter Term*, 5. *Edw. 4. Roll 34.*

ALL THE COURT hereupon resolved, that this writ of appeal lies not; and therefore adjudged for the defendant.

A certiorari  
does not lie to  
remove an  
appeal of murder  
from the grand  
session in *Wales*.

Post. 332.—1. Roll. Ab. 394. Cro. Jac. 484. Poph. 144. 1. Salk. 146. 2. Mod. 135. Stra. 553. 704. Cowp. 751. 2. Hawk. P. C. 407. Dougl. 749.

NOTE, The statute of 26. *Hen. 8. c. 6.* allows that indictments may be in counties next adjoining, but there is not any mention therein of appeals; and for this reason certioraries have been granted, to remove indictments out of the grand sessions, but never writs of appeals.

(a) 24. & 25. Eliz.

#### CASE 9.

#### Lancelot against Allen.

*Trinity Term*, 3. Car. 1. Roll 1037.

The citizens of  
*London* may, by  
virtue of the  
custom con-  
firmed by the  
charter of  
*Edward the*  
*third*, grant  
lands in mort-  
main without  
licence from  
the crown.  
Post. 455. 517.  
576.  
Hern. 189.  
S. C. Jones, 251.  
4. Co. 114.  
Priv. Lond. 156.  
2. Inst. 21.

TRESPASS for entering into an house in *Saint Olave's, Hart Street*. Upon not guilty pleaded, a special verdict was found, that "one *Cromer*, being seised in fee of an house in *Saint Swithin's*, and of divers houses in *Saint Olave's* in *London* (where the custom being also found, that every citizen or freeman may devise his lands in mortmain), devised the tenement in *Saint Swithin's* to the parson of *Saint Martin Orgar's* and his successors, to find annually one to sing mass in the church of *Saint Orgar's* every day, and that there should be paid to him ten marks by the year: and he devised his houses in *Saint Olave's*, whereof the land in question is parcel, to his wife for life, to find an anniversary, and to expend thereupon divers sums amounting to 3l. 6s. 8d. and after her death to the said parson and his successors finding the said anniversary; and further appointed to the churchwardens 6s. 8d. for their pains to see it observed, *et quod superfuerit* over and above the said charges, he wills, shall remain in the hands of the churchwarden of *Saint Martin Orgar's*, "*ad manutenendum capellanum prædictum, et ad amandandum et reparandum dictam ecclesiam de SAINT MARTIN ORGAR et ornamenta ejusdem ecclesie, secundum eorum discretionem.*"

"PROVISIO

"PROVISO *semper, quod si contigerit prædict. terras et tenementa in SAINT SWITHIN'S in aliquo casu fore minoris valoris quàm decem marcis, per quod capellanus prædictus ut prædictum est inveniri non poterit, tunc volo quod totum quod de prædictâ annuali summâ de decem marcis haberi et levare non poterit, haberetur et levaretur de proficuis tenementorum prædictorum in SAINT OLAVE'S*" by the said parson and his successors, "*ad opus et sustentationem dicti capellani in perpetuum.*" And they find, that the tenements in *Saint Swithin's*, at the time of the will making, and before, were but of the yearly value of 6l. 5s.; and the tenements in *Saint Olave's*, at the time of the will, and always after until the time of the statute of 1. Edw. 6. c. 14. (a), were of the value of 24l. 10s. *per annum*, and that the priest and the said other uses were employed and maintained until the making of the said statute of 1. Edw. 6. c. 14. and that the plaintiff claims as lessee of the parson, and the defendant claims under the patentee of the king.

LANCELOT  
against  
ALLEN.

(a) 4. Co. 104.  
Cro. Eliz. 449.  
799.

The question was, Whether the parson of *St. Martin's Orgar* hath title to those tenements of *Saint Olave's*?

And after argument at the bar it was held by ALL THE COURT, that if this PROVISO had not been added the lands had been clearly given to the king by the statute of 1. Edw. 6. c. 14. as lands given for the maintenance of a priest; for the clause, for those lands of *Saint Olave's*, was limited: "*quod superfuerit,*" after the anniversary maintained, shall be "*ad manutenendum capellanum prædictum, et reparandum ecclesiam et ornamenta ejusdem ecclesiæ.*" The superstitious use being certain, and the good use, *viz.* "*ad reparandum ecclesiam et ornamenta ejusdem ecclesiæ,*" uncertain, the superstitious use certain shall cause that all shall be given to the king.

A devise of lands to find a priest, with a salary of five pounds a-year, and the remainder to be employed toward the repair of the church, is within the statutes of 23. Hen. 8. c. 10. and 1. Edw. 6. c. 14. and given to the king; for the superstitious use is certain, but the charitable use uncertain. Post. 436.

But RICHARDSON, Chief Justice, JONES, and WHITLOCK, conceived, that by the PROVISO it appears it was his intent the priest should have but ten marks, and what was wanting in the value thereof should be supplied out of the tenements of *Saint Olave's*, so that nothing is given to the priest but the ten marks; therefore the houses in *Saint Olave's* were not given to the king.

Moor, 131. 264.  
4. Co. 106. 111.  
116.  
Godb. 309.  
Dyer, 337.  
1. Roll. Rep. 417.  
2. Vern. 226.  
Latch. 38.  
1. Salk. 163.

But I doubted thereof, conceiving all to be given to the king, for the PROVISO doth not alter it; for in the first clause all the profits of those houses, after the anniversary paid, are given for the maintenance of a priest indefinitely, and to the reparation of the church, &c., and the PROVISO doth not abridge it, for that appoints, what is wanting in *Saint Swithin's* shall be made up out of *Saint Olave's*, and so to pay the ten marks first appointed, so as he shall have the said ten marks *de certo* out of both the said tenements in *Saint Swithin's* and *Saint Olave's*. But that doth not take away the clause, that the residue of the profits of the tenements in *Saint Olave's* shall be to the parson, "*ad sustentationem dicti capellani.*" And of this opinion was HYDE, Chief Justice, when he lived; but it being moved again in SIR THOMAS RICHARDSON's time, he agreeing with JONES and WHITLOCK in their opinions, it was adjudged for the plaintiff, that these houses were not given to the king.

Easter

I  
H  
the  
fa  
T  
m  
th  
an  
co  
fo  
th  
th  
v  
v  
v



## Easter Term,

8. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir James Whitlock, *Knt.*Sir George Croke, *Knt.*} *Justices.*William Noy, *Esq. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*

The King against Sir James Wingfield and Others.

CASE 1.

**I**NFORMATION by the king's attorney against *Sir James Wingfield*, *Sir Francis Bodenham*, *James Bedell*, *Thomas Brady*, *John Hampden*, and *John Neale*, For that they had made an assault upon the sheriff of Middlesex, in serving an execution upon the said *Sir James Wingfield*, by which means he escaped and rescued himself.—They all pleaded not guilty; and now upon the trial all except *Bedell* made default, and he appeared.

In a criminal information against several the default of one shall not prejudice the others.  
Ante, 209.

NOY, *Attorney General*, urged strongly, that it was no reason but that the default of the others should bind him, for it is one intire suit, and they all have joined in a plea, and therefore may not now be severed.

BUT ALL THE COURT held, because the suit was for a criminal offence, although they all pleaded *not guilty*, yet it is to every one of them *quasi* several, and the default of one shall not be the default of the others, nor the confession of any of them shall prejudice the others; whereupon the inquest was taken by default only against the four which appeared not; and they all were found guilty except *Bedell*, whom the jury acquitted.

The king's attorney now praying judgment, THE COURT severally delivered their opinions, and gave judgment, that *Sir James Wingfield*, being the principal offender, should pay five hundred pounds; and *Brady* five hundred marks, because it appeared upon the evidence he drew his sword and wounded the sheriff grievously, and by that means *Sir James Wingfield* escaped into the said *Neale's* house; and against the said *Neale*, because he kept out the sheriff, shutting the door against him, and not suffering him to search for the prisoner, whereby he escaped, one hundred and eighty pounds; and against *Sir Francis Bodenham*, because he was the means of conveying away the said prisoner to *Lincoln's Inn*, five hundred marks; and against the said *John Hampden*, because he was aiding with the said *Sir Francis Bodenham*, two hundred pounds.

Judgment on an information for assaulting a sheriff in serving a writ of execution.

And IT WAS RESOLVED, that such fines assessed in court by judgment upon an information cannot be afterwards qualified or mitigated (a).

The Court cannot mitigate a fine after the Term.

(a) 1. Inst. 260. Raym. 376.—Sed vide 2. Hawk. P. C. ch. 48. s. 10. contra, during the Term in which it was imposed. See also Vent. 336. Salk. 55.

The

## CASE 2.

## The King against The Mayor and Commonalty of London.

By the common law, if any homicide be committed, or dangerous wound given, in a walled town, and the offender be suffered to escape, the town shall be amerced.

Sum. 90.

2. Hale, 73. 75. 155.

3. Inst. 53.

4. Inst. 183.

3. Leon. 207.

Dyer, 210.

Dalton, 204.

139. 326.

3. Com. Dig.

179.

1. Hawk. P. C. 298.

2. Hawk. P. C. 115, 116.

**I**NFORMATION was brought against the mayor and commonalty of London, Whereas they were incorporated by that name, and it was a walled city, and recites the statute of 1. Edw. 4. c. 1. that the mayor for the time, and all who have been mayors, should be justices of the peace within the city, and that the sheriffs are made amongst themselves, and coroners appointed by themselves, and that by law they ought to suppress riots and all unlawful assemblies, notwithstanding in June, 4. Car. 1. in the day-time, that one JOHN LAMB, alias dictus DOCTOR LAMB, was slain in a tumult, and none of the offenders taken, nor any person known or indicted for that felony. Upon this information the mayor and commonalty appeared, and confessed the offence, *et posuerunt se in gratiam curiæ*, &c. for which they were amerced to fifteen hundred marks; for it was conceived to be an offence at the common law to suffer such a crime to be committed in a walled town *tempore diurno*, and none of the offenders to be known or indicted. *Vide* 3. Edw. 3. cor. 299. 22. Edw. 3. cor. 238. 8. Edw. 2. cor. 425. *Stamf.* 33. 7. Co. 7. 3. Hen. 7. 15. Dyer, 210. And NOV, Attorney General, shewed a record in Michaelmas Term, 18. Edw. 3. Roll 132. of an indictment of a town in Devonshire for suffering an assembly, as it were, to hold assises in mockery of justice; and the 21. Hen. 6. a presentment before FORTESCUE against the town of Norwich, that there was a great riot in Norwich, and one Gladman took upon him to be king, and went with a crown of paper in a riotous manner to the priory of Norwich, &c. and although it appears not upon the roll *quid inde venit*, yet *per rot. patent.* 27. Hen. 6. memb. 13. their liberties for that cause were seized, and regranted.

## CASE 3.

## Tyndal's Case.

A writ of *certiorari* lies from the king's bench to the mayor and jurats of any of the Cinque Ports, to remove an indictment of felony.

See S. C. post. 264. 291.

S. C. 1. Roll.

Abr. 395.

4. Inst. 223.

Cro. Eliz. 910.

Cro. Jac. 543.

Palin. 54. 3.

**A**CERTIORARI was awarded to the mayor of *Hith* and the jurats there, being one of the Cinque Ports, to remove an indictment of felony, viz. buggery, against one Tyndal supposed to be committed there. The writ was not returned upon pretence of a liberty or privilege belonging to the Cinque Ports, that the king's writ out of any of his courts shall not be awarded to them, but ought to be directed, "To the Lord Warden of the Cinque Ports," who ought to make the warrant to them to execute it; and because the writ was brought to them, and no warrant from the warden, they would not return it: whereupon an *alias certiorari* being awarded and delivered to "The mayor and jurats" in court, upon oath made that they said they would not return it, and for that they imprisoned the messenger who brought it in their common gaol, and that one Knight, a jurat, spake contemptuously of the

Com. Dig. 396. 2. Hawk P. C. 400. 434.

writ

writ being under green wax (the seal of the Court,) saying, "This is no time for green plums." Upon these contempts proved by several oaths, AN ATTACHMENT was prayed against them and awarded. TINDAL'S CASE.  
L. Raym. 346.

Now, the King's Attorney, being in court, now said, that for this contempt he would exhibit an information: for such contempts against the king's messenger who brought the king's writ are contempts against the king's person, and such contempts ought to be severely punished; for it is termed *dimicare contra regem et non disceptare*: and he shewed a record in court, 33. Edw. 1. Roll 101. where the Bishop of Durham pretended he had such privileges that the king's writ ought not to run there; and because one brought the king's writ thither, imprisoned him: and for this cause an information being exhibited against him, and, the offence proved, it was adjudged he should pay a fine to the king, *et quod capiatur*, and should lose his liberties for his time: and the entry in the roll is, that he shall lose his liberties, because *justum est quod in eo quod peccat, in eo puniatur*: and he shewed another precedent in Trinity Term, 21. Edw. 3. Roll 46. or 460. where in the common pleas a prohibition was awarded to the Bishop of Norwich, and he excommunicated the party who brought the writ, and thereupon the party brought his action on the case, and declares all this matter; and he being found guilty, it was adjudged, that his temporalities should be seized until he absolved the party, and satisfied the king for that contempt, and that the party should recover against him for damages ten thousand pounds; and upon that judgment the bishop brought a writ of error in the king's bench; and this judgment was affirmed. And thereupon the Attorney-general moved for the king, that in this case a new writ might be awarded, and they to make a return thereupon as they shall be advised. And it was said, although in civil pleas they have such jurisdiction (for their court is ancient time whereof, &c. and confirmed by act of parliament), yet it cannot extend to what they do as justices of peace, which began within time of memory: and that MAGNA CHARTA, c. 9. and Art. sup. Chart. c. 7. are only, that they shall have "*consuetudines suas, &c.*" and that cannot be extended to matters of the crown, with which they meddle as commissioners of the peace or *oyer and terminer*, which are all subject to the jurisdiction of this court. Ante, 247.  
Cro. Jac. 543.

In Michaelmas Term, 8. Car. 1. a *certiorari* was prayed to be awarded to "The mayor and justices of Dover," being within the Cinque Ports, to remove an indictment of felony against one Ringden, of Dover, who was indicted there of buggery.—HENDEN, Serjeant, moved, that this should be awarded, and directed "To the Lord Warden of the Cinque-Ports," as other process is usually directed. But, upon debate, ALL THE COURT agreed, that it should be immediately directed to the justices before whom the indictment was; for they held plea of it as justices of the peace by virtue of their commissions, and not by their ancient charters or prescription; which was awarded accordingly. A *certiorari* to remove an indictment from justices within the Cinque Ports shall be directed immediately to them.  
Post. 264.  
1. Roll. Ab. 395.  
2. Hawk. P. C. 400. 434.



## CASE 4.

## Rhemes against Humphreys and his Wife.

Hilary Term, 7. Car. 1. Roll 1202.

*Trover* lies against husband and wife for a conversion by the wife only; but if it be alleged *ad usum ipsorum*, it is bad. Post. 494, 495.

R. 226

Jones, 264.

1. Roll. Ab. 6.

348.

Yelv. 165.

1. Brownl. 3.

1. Vez. 24.

Cro. Jac. 5. 661.

Stiles, 115.

Cro. Car. 495.

**T**ROVER AND CONVERSION of goods by husband and wife, *ad usum ipsorum*. They pleaded not guilty; and both were found guilty, and damages assessed.

It was now moved in arrest of judgment, that the action lies not against the husband and wife jointly for conversion *to their uses* during the coverture, for when they join, it is the act of the husband only, and the wife cannot convert to her own use; but an action of *trover* well lies for conversion by the wife before the coverture, or by the wife only during the coverture; for she may do a *tort* solely, and the husband shall be sued with her, but not where she joins with the husband.

THE COURT therefore would advise thereof; and afterward, in *Trinity Term*, 8. Car. 1. it was adjudged for the defendants. 38. *Edw. 3. pl. 1. 13. Rich. 2. "Breve," 644.*

Cro. Car. 495. Mar. 94. 134. Carth. 251. Andrews, 242. 1. Com. Dig. 220. 5. Com. Dig. 194.

## CASE 5.

## Boulton against Banks.

Hilary Term, 7. Car. 1. Roll 276.

A declaration in *trespass on the case*, reciting the writ to be in a *plea of trespass* generally, is good.

Post. 325.

Hob. 180.

Allen, 84.

3. Lev. 338.

An action on the case will lie for knowingly keeping a dog used to bite and kill swine.

See post 487.

D. &amp; S. ch. 42.

8. Rep. 32.

Noy's Max. 92.

4. Co. 18. 3.

Bl. Com. 153.

12. Mod. 332.

335. Ld. Ray. 608.

1583. 1. Freeman, 534.

Strange, 1264.

**A**CTION UPON THE CASE. Whereas the defendant kept a mastiff, *sciens* that he was *assuetus ad mordendum porcos*, and that the plaintiff was possessed of a sow great with pigs, that the said mastiff bit the said sow so as she died of the biting.

After verdict, upon not guilty pleaded, it was moved in arrest of judgment, FIRST, That the recital of the bill is in a plea of *trespass*, and the declaration is in a plea of *trespass on the case*.—*Sed non allocatur.*

THE SECOND EXCEPTION, That to declare of a dog *ad mordendum porcos assuetus* is not good, for it is proper for a dog to hunt hogs out of the ground; and his biting of the hogs is necessary, and not like to the keeping of a dog which usually bites sheep or other cattle.

BUT THE COURT, *absente* RICHARDSON, conceived the action well lies; for it is not lawful to keep dogs to bite and kill swine. Wherefore it was adjudged for the plaintiff.

Bl. Com. 153. 12. Mod. 332. 335. Ld. Ray. 608. 1583. 1. Freeman, 534. Strange, 1264. 3. Bl. Com. 153.

## CASE 6.

## Jesson against Laxon.

Trinity Term, 7. Car. 1. Roll 258.

A continuance in an inferior court until the next court day is sufficiently certain.

Cro. Jac. 314.

357. 571.

1. Roll. Ab. 484.

Shower, 95. 319.

Dyer, 262.

1. Mod. 81.

**E**RROR of a judgment in *Coventry*. The error assigned was, Because the judgment, being by *nihil dicit* in debt, was discontinued: for the continuance was taken until the next court, which is uncertain; for it ought to be to a day certain, as 9. *Eliz. Dyer*, 262.

But it was answered, that in *Coventry* there is no day certain for the keeping of their courts; for sometimes it is held within a fortnight, sometimes within three weeks.

JONES, *Justice*, said, all their proceedings in *Wales* are adjourned until the next great sessions, and none knows when the great sessions

shall

shall be held. And this error was assigned and over-ruled in the case of *Bythell v. Parry*; and so RICHARDSON, JONES, and WHITLOCK, conceived it should be here; but I doubted thereof. The judgment was affirmed.

JESSON  
against  
LAXON.

1. Roll. Ab. 484.

Mounson *against* Cleyton.

CASE 7.

**SCIRE FACIAS** to have execution upon a judgment in debt. *Scire facias* may be had on a judgment against a defendant who has escaped, notwithstanding the plaintiff confesses him in execution *en a co. sa.*

The defendant pleads, that, at another time before, the plaintiff had sued a *capias ad satisfaciendum*, and that the defendant was arrested, and in execution thereupon, and demands judgment, &c. The plaintiff replies, true it is, such a writ of *capias ad satisfaciendum* issued, and that the defendant was arrested thereupon, and made rescous, and escaped; therefore he sued this *scire facias* to have execution, being after the year and day.

Upon this the defendant demurred, pretending, because the plaintiff had confessed the defendant was once in execution, he could not afterward take a new execution.

But THE COURT resolved, that the *scire facias* was well maintainable; for when he had not the benefit of his execution, it was as none, and the defendant shall never take advantage of his own wrong by his escape; and peradventure the sheriff is dead, so the plaintiff hath not any remedy against him. Whereupon it was adjudged for the plaintiff, that he should have execution.

Ante, 75. 240.  
1. Roll. Ab. 901.

Trinity

## Trinity Term,

8. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir James Whitlock, *Knt.*Sir George Croke, *Knt.*William Noy, *Esq., Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*} *Justices.*

CASE 1.

Butler against The President of the College of Physicians.

Easter Term, 7. Car. 1. Roll 519.

An action QUI  
TAM may be  
"QUI TAM pro  
"domino rege  
"quam pro  
"seipso;" but  
an information  
shall only say  
"QUI TAM pro  
"rege quam pro  
"seipso sequitur."  
Post. 336.

Jones, 261.

2. Bulst. 185.

Ld. Ray 153.

ERROR of a judgment on a demurrer in the common pleas.  
THE FIRST ERROR assigned was, Because the record was,  
"Ad respondendum domino regi et Presidenti Collegii, &c. QUI TAM  
"pro domino rege, quam pro seipso sequitur quod reddat eis sexaginta  
"libras; unde idem presidens QUI TAM, &c. dicit, &c.;" whereas  
the action ought to have been brought by the president only *qui tam*,  
&c. and not by the king and president, &c.—*Sed non allocatur*; for  
being an original writ, the writ is most often so, and sometimes the  
other way: and they conceived it good both ways. But informations  
are always, that the party *qui tam* for the king *quam pro seipso sequitur*.

Moor, 64. Dyer, 227. Plowd. 77. New Bk. Ent. 160. Old Bk. Ent. 143. 373.  
1. Com. Dig. 228. 1. Bac. Abr. 38. 2. Hawk. P. C. 379.

An action for  
practising physick  
contrary to the  
charter 10 Hen.  
8. confirmed by  
statute 14. Hen.  
8.—The defend-  
ant pleads the  
34. Hen. 8. au-  
thorising the  
practice he had  
used.—The  
plaintiff replies,  
that by 1. Mary,  
c. 9. the charter  
and the statute  
of 10 & 14. Hen.  
8. were con-  
firmed, "any  
"other statute  
"or ordinance  
"to the con-  
"trary not-  
"withstand-  
"ing."—This  
is no departure  
from the decla-  
ration.  
Post. 334.

Yelv. 13.

5. Com. Dig.

THE SECOND ERROR was, That the replication was a departure  
from the count; for the count sets forth, that KING HENRY THE  
EIGHTH anno decimo regni sui incorporavit (and by the statute of  
14. Hen. 8. c. . confirmavit) the College of Physicians by the name  
of "The president," &c. "that no man should practise physick in  
"London, or within seven miles, without licence under the seal of  
"the college, upon the penalty of five pounds for every month that  
"he so practised, the one moiety to the king, the other to the pre-  
"sident of the college, to the use of the said college:" and for that  
the defendant, not being allowed, &c. had practised physick for twelve  
months in London, the said action was brought, &c. The defendant  
pleads the statute of 34. Hen. 8. c. 8. "That every one who hath  
"science and experience of the nature of herbs, roots, and waters,  
"or of the operation of the same by speculation or practice, may  
"minister or apply in and to any outward sore, uncome, wound,  
"aposthumations, outward swelling, or disease, any herb, oint-  
"ments, baths, pultees, or implaisters, according to their cunning,  
"experience, and knowledge, &c. or drink for the stone and stran-  
"gury or agues in any part of the realm, without suit, vexation,  
" &c. any act or statute to the contrary notwithstanding." And  
that he having skill in the nature of herbs, roots, and waters, by  
speculation and practice, applied to persons requiring his skill herbs,  
ointments, baths, drinks, &c. to their sores, uncomes, wounds, and

Saund. 83. 189. Cro. Jac. 121. Co. Lit. 304. a. Plowd. 105. b. 1. Lev. 81.  
102. 4. Bac. Abr. 123.

for



for the stone and strangury, or agues, and to all other diseases in the said statute mentioned, *prout ei bene licuit. Et quoad aliquam aliam practificationem seu facultatem medicinæ aliter vel alio modo, quod non est culpabilis. Et de hoc ponit, &c.* And makes his averment, *et hoc paratus est verificare.* The plaintiff replies, and shews the statute of 1. Mary, c. 2. which confirms the charter of 10. Hen. 8. and the statute of 14. Hen. 8. and appoints that "it shall be in force notwithstanding any statute or ordinance to the contrary." And upon this it was demurred, because it is a departure; for it entitles him by another act, *viz.* the 1. Mary, c. 9. which is not mentioned in the count; and therefore it was assigned for error. But ALL THE COURT here conceived, that it is no departure, because it fortifies the count, and is as to revive the statute of 14. Hen. 8. if it were repealed in this particular by the 34. Hen. 8. c. 8. And for that the case of *Wood v. Hawkhead* (a) was shewn to the Court, in *Michaelmas Term*, 42. & 43. Eliz. Roll 397. where the president of the College of *All-Souls* brings an action upon the case for taking toll, and shews a charter of 26. Hen. 6. to be discharged of toll, the defendant pleaded the act of resumption of liberties granted by Henry the sixth, and so the liberty gone. The plaintiff pleaded a reviver of them by the statute of 4. Hen. 7.: and IT WAS HELD to be no departure, but as it were a confession and avoiding.

THE THIRD and principal ERROR assigned was, If the statute of 34. Hen. 8. c. 8. be not repealed by the statute of 1. Mary, c. 9.; and if not, Whether the defendant hath made a sufficient justification? And *quoad* that, Whether the said statute be repealed? THE COURT was not resolved.—But RICHARDSON, *Chief Justice*, conceived, it was repealed by 1. Mary, c. 9. by the general words, "any act or statute to the contrary (of the act of 14. Hen. 8.) notwithstanding." But I conceived, that the act of 34. Hen. 8. c. 8. not mentioning the statute of 14. Hen. 8. was for *physicians*; but the part of the act of 34. Hen. 8. c. 8. was concerning *chirurgeons*, and their applying outward medicines to outward sores and diseases, and drinks only for the stone, strangullion, and ague; that statute was never intended to be taken away by the act of 1. Mary, c. 9.—But to this point JONES and WHITLOCK would not deliver their opinions.

But admitting the 34. Hen. 8. c. 8. be in force, yet THEY ALL RESOLVED, the defendant's plea was naught, and not warranted by the statute; for he pleads, that "he applied and ministered medicines, plaisters, drinks, *ulceribus, morbis, et maladiis, calculo, strangurio, febris, et aliis in statuto mentionatis*;" so he leaves out the principal word in the statute, *viz.* "externis:" and doth not refer and shew, that he ministered potions for the "stone, strangullion, or ague," as the statute appoints to these three diseases only, and to no other. And by his plea his potions may be ministered to any other sickness; wherefore they all held his plea was naught for this cause, and that judgment was well given against him.—Whereupon judgment was affirmed.

BUTLER  
against  
THE PRESIDENT of the  
COLLEGE of  
PHYSICIANS.

(a) Yelv. 13.  
Lit. Rep. 215.

Quare, If 34.  
Hen. 8. c. 8. is  
repealed by the  
general words  
of 1. Mary, c. 9.  
"any act or or-  
dinance to the  
contrary not-  
withstanding."  
Lit. Rep. 169.  
212.  
Cro. Jac. 135.  
Jones, 261.  
4. Com. Dig.  
404.

S. C. Lit. 169.

## CASE 2.

## Walker against Sir John Lamb.

Trinity Term, 7. Car. 1. Roll 374.

Special verdict on an action on the case for disturbance in the offices, & Of official of an archdeaconry.

2. Of commissary to a bishop: and adjudged, that a grant of them in reversion is good. Post. 279.
2. Roll. Ab. 154 Jones, 264. 311.
2. Lev. 245.
4. Mod. 17. Hard. 357.
11. Co. 4.

**A**CTION ON THE CASE, for disturbance of the plaintiff in exercising his offices of the officialty of the archdeaconry of *Leicester*, granted by the archdeacon of *Leicester*, and of the office of commissary of the bishop of *Lincoln*.

Upon NOT GUILTY pleaded, a special verdict was found, that these were ancient offices, the one granted by the archdeacon of *Leicester*, the other by the bishop of *Lincoln*, and were offices of judicature always granted to one person for life until 1609; and in the 30. *Eliz.* were so granted to *Dr. Chippendale*; and after, in 1609, those offices were granted to *Dr. Chippendale* and to one *Edward Clerk* for their lives, no surrender being actually made by *Dr. Chippendale*. Afterward, 1614, both offices were granted, the one by the archdeacon, the other by the bishop, to *Sir John Lamb* and to the said *Edward Clerk*; and those grants, confirmed by the dean and chapter: that in 1622, *Dr. Chippendale* died; and afterwards the archdeacon who granted that office, and the bishop who granted the office of commissary, died; and the bishop of *Lincoln* who now is, and the now archdeacon by several patents granted those offices to the plaintiff, who was at the time of the grant of the patent a lay-person, and bachelor of the civil law only: and they find the statute of 37. *Hen. 8. c. 17.* that lay-persons, married or unmarried, being doctors of the civil law, may be commissaries, officials, scribes, or registers; and that the plaintiff exercised those offices, and the defendant disturbed him. *Et si super, &c.*

Upon this the matter, being argued at the bar, was reduced only to two questions:

The 37. *Hen. 8. c. 17.* does not restrain a lay person and bachelor of the civil law only from holding the offices of commissary, chancellor, or official to a bishop. Post. 279. 555. Jones, 264. Poph. 37. Cro. Eliz. 315. Salk. 134. 3. Com. Dig. 149. 251. Ld Ray. 49. 51. 853.

FIRST, Whether the patent to the plaintiff, being a lay-person and not a doctor of the law, were good, or restrained by the statute of 37. *Hen. 8. c. 17*? And as to that point, ALL THE COURT conceived the grant was good; for the statute doth not restrain any such grant; and it is but an affirmance of the common law, where it was doubted if a lay or married person might have such offices; and to avoid such doubts this statute was made, which explains, that such grants were good enough; and it is but an affirmative statute, and there is no restriction therein. And although the statute saith, that doctors of the law (though lay persons or married) shall have such offices, yet that is not any restriction that none others should have them but doctors of the law; and the statute mentions as well registers and scribes as commissaries, and that a doctor of the law shall have them; yet in common experience such persons as are merely lay and not doctors have had such offices. And upon this very point was a case in this court of *Pratt v. Stock (a)*, where, upon demurrer, this statute was pleaded against the plaintiff to whom the commissaryship was granted, being but a bachelor of law, and he having granted administration, the grant was adjudged good; and the *Bk. of Entries*, 484. and 489. was allowed good. Wherefore they resolved the grant was well enough.

(a) Hilary, 35. *Eliz.* Roll 181. Cro. *Eliz.* 315.

And IT WAS ALSO RESOLVED, that where an officer for life accepts of another grant of the same office to him and to another, it is not any surrender of the first grant.

WALKER  
against  
SIR J. LAMB.  
Ante, 198.

THE SECOND POINT was, Whether the office of the officialty of the archdeaconry and the office of the commissary of the bishop be grantable by the 1. Eliz. c. 19. and 13. Eliz. c. 10. because it was pretended they were not parcel of the possessions of the bishoprick or archdeaconry, so as they could have any profits by them, and then the statute doth not restrain the grants of them? But ALL THE COURT resolved, they were within the words and intent of the statutes; for they are hereditaments (a), and are pertaining unto them: and that a grant of those offices to two, where they were only grantable to one for life, and being granted in reversion, is a void grant by the statutes against the successors; for the statutes restrain all grants of any thing to be avoidable against the successor, besides grants of necessity and leases for three lives or one-and-twenty years, where the ancient rent is reserved: and all other grants, as well of offices as of other things, not warranted by the statutes, are made void as against the successors. 10. Co. 60. *The Bishop of Salisbury's Case*. 5. Co. 14. and a case of *Vaughan v. Crompton*, 14. Jac. 1. at the assizes before the justices of assize for the office of the registerhip in *Suffolk*; and in *Johns v. Powell* for the register's place of *Hereford*, where it was adjudged, that such offices granted in reversion were void. Whereupon rule was given that judgment should be entered for the plaintiff, unless other cause were shewn. And afterward, being moved again, judgment was given for the plaintiff.

The statutes of  
1. Eliz. c. 19.  
and 13. Eliz.  
c. 10. restrain  
bishops and  
archdeacons  
from granting  
the offices above-  
mentioned, so  
as to bind their  
successors for a  
longer term  
than one life,  
unless usually  
granted in re-  
version.  
10. Co. 60.  
5. Co. 14.  
Cro. Eliz. 440.  
637.  
Cro. Car. 49.  
557.  
1. And. 244.  
Jones, 264.  
Bridg. 29. 31.  
Ley, 71.  
2. Lev. 137.  
4. Mod. 17.  
Duke, 139.  
Bac. Abr. 723.

Co. Lit. 44. 1. Burr. 219. 3. Com. Dig. 250. 3. Bac. Abr. 723.

(a) By 5. Geo. 3. c. 17. Leases for three lives, or twenty-one years, by ecclesiastical persons, of incorporeal hereditaments which lie in grant and not in livery, are declared good.

### Tredymmock against Perryman.

CASE 3.

Michaelmas Term, 7. Car. 1. Roll 76.

ERROR of a judgment in *Cornwall* in debt upon an obligation. The error assigned was, Because the trial of the issue joined there was by six jurors only.

A custom to try causes in an inferior court by six jurors instead of twelve is bad.  
1. Roll. Ab. 564.  
3. Keb. 326.  
1. Sid. 233.  
See Co. Lit. 155 a. note (3).  
Doug. 104.

ROLLE, for the defendant, moved, that it is not error; for it is returned that he tried it there by six *secundum consuetudinem ibidem a tempore, &c.* before used; and the court being by prescription, the trial then by the custom may be by six: and there is multitude of records in twenty several courts in *Cornwall* where trials may be by six, by customs there used; wherefore if it should be reversed, many others should be reversed.

But ALL THE COURT held, that such a custom is void, and against the common law; and there cannot be an exemption of persons from being jurors, unless there be sufficient jurors besides the persons exempted to make trials.—And JONES said, although in some parts of *Wales* there be such trials by six only, it is by reason of an act of parliament of 34. & 35. Hen. 8. c. 26. f. 74. (a), which

(a) Vide 3. Geo. 2. c. 25. f. 9.

appoints,



TREDYMMOCK  
against  
PERRYMAN.

appoints, that such trials may be by six only where the custom hath been so; which proves that, when they were united to *England* and to be governed by the laws here, such trials could not be, unless they had been so provided for by parliament. Whereupon the judgment was here reversed.

## CASE 4.

## Major against Brandwood.

Hilary Term, 5. Car. 1. Roll 643.

The lord may at his election distrain or seize for *heriot service*; and, upon replevin, the avowry need not shew the particular thing to which he is entitled as a *heriot*; but if he seize, he can only take the identical thing.

S. C. Hutton, 176.

Co. Copy. s. 25.

Plowd. 96.

Moor, 540.

Cre. Eliz. 590.

Bendl. 47.

1. And. 299.

Lutw. 1367.

Salk. 356.

2. Hen. 7. 156.

27. Aff. 24.

Kely. 167.

Kit. 134.

3. Mod. 231.

3. Bl. Com. 15.

Gillb Ten. 248.

2. Com. Dig.

518.

3. Bac. Abr. 52.

Ld. Ray. 169.

308.

2. Espin. Dig. 42.

**R**EPLEVIN of an ox taken, &c. The defendant makes countenance as bailiff of *John Brandwood*, for that he was seised in fee of the manor of *D.* and that one *Smith* was seised in fee of such a tenement holden of the said manor by *rent and heriot service*, payable after the death of the tenant, and that *Smith* died possessed *de animalibus et catallis*; and because the *heriot* was not paid, he, by the command of the said *John Brandwood*, distrained, and so made *CO-NUSANCE*. The issue was upon the *tenure*; and found for the defendant.

Exception was now taken in arrest of judgment, because he doth not shew what was the best beast, which he demanded, nor the kind thereof, nor the price of it: for this cause *HYDE* moved, that the avowry was ill, for it is uncertain what thing the defendant should have, or how he shall be satisfied if he should have return. And he said, all the precedents are in point, that he ought to shew what the *heriot* is when he demands the price thereof. 8. Co. 103. *Talbot's Case*, *Plowd.* 94. *Bk. of Ent.* 584.

But *HUTCHINSON* said, when the lord distrains, it is because the *heriot* is eloigned, and therefore he cannot seize it; so then he cannot shew what is the best beast: and for an *heriot service* it is at the lord's election either to distrain or to seize it, if he can find it, yet seize he cannot, unless the proper beast of the tenant only; but he may distrain any man's beasts, which are upon the land, and retain them until the *heriot* be satisfied. And he said, there were divers precedents in the common pleas, where he avows without shewing what was the best beast, or any price thereof; and it would be inconvenient to enforce the avowant to shew it, for peradventure he doth not know, or ever saw it. *Vide* 24. *Edw.* 3. pl. 72. 44. *Edw.* 3. pl. 13.

Afterwards it was adjudged for the avowant.

**THIS CASE** was moved again, *Michaelmas Term*, 8. Car. 1. by *GERMYN*, that the *avowry* was not well made, because it doth not appear what beast he should have for the *heriot*, nor of what value, the return being irreplevisable; nor can the plaintiff know what to offer to have again his cattle.—But ALL THE FOUR JUSTICES present agreed, that the *avowry* is good enough: for peradventure the avowant doth not know what was the best beast, and the plaintiff having done wrong by his eloignment, he at his peril ought to tender sufficient recompence: and that the *avowry* was good, there were shewn two precedents, the one in *Trinity Term*, 18. *Eliz.* Roll 506. *Dicker v. Higgins*, and the other in *Trinity Term*, 13. *Jac.* 1. Roll 1148.

Jones, 300.  
Hob. 176.  
Hutton, 4.

Hixe against Hollingshed.

CASE 5.

Hilary Term, 7. Car. 1. Roll 765.

**E**RROR of a judgment in the common pleas in an action upon the case for words: "She is a bawd, and hath bewitched him by witchcraft and forcery." An action lies for saying, "She is a bawd, and hath bewitched me." *Vide ante*, 229. Post. 324. 1. Roll. Ab. 44, 45.

GERMYN, for the plaintiff in the writ of error, moved, that these words are not actionable: for to call one "bawd, no action lies at the common law; but to say that "she keeps a house of bawdry," is actionable at the common law; and that the judgment passed *sub silentio* in the common pleas.

But it was held by JONES and MYSELF, that the action well lies for the last words, "and hath bewitched him, &c.;" but for the first words it was doubted. Wherefore, *cæteris absentibus*, a rule was given that judgment should be affirmed.

See the 1. Jac. 1. c. 12. and 9 Geo. 2. c. 5.

Mead against Perkins.

CASE 6.

**E**RROR of a judgment in the common pleas in an action for words: where the plaintiff Perkins declared, That he was an attorney of the common pleas, and of the sheriff's court in London; and that the defendant spake these scandalous words of the plaintiff: "He (*presatum* the plaintiff *innuendo*) is a cozenor and cozens his clients in the sheriff's court of London, and was for that cause discharged of that court." The defendant pleaded not guilty; and found against him, and judgment: and the error assigned, That the words are not actionable.—But THE COURT held, they were scandalous, and touched him in his profession. And judgment was affirmed.

To charge an attorney with having cozened his clients, is actionable. Cro. Jac. 586. 4. Term Rep. 366.

Ellis against Johnson.

CASE 7.

Trinity Term, 7. Car. 1. Roll 1039.

**E**RROR of a judgment in D. in an inferior court. The error assigned, Because after an *habeas corpus cum causa* was sued out of this court, and delivered to the mayor and principal officer of that court, and acceptance and allowance thereof, they notwithstanding proceeded to trial and judgment. The defendant pleaded *in nullo est erratum*.

GERMYN now moved, that this is not error; because he doth not allege the *habeas corpus* to be upon record; so as the error now assigned is not triable.

But IT WAS HELD, that that proceeding after the *habeas corpus* delivered is an error, and *coram non judice*, which is confessed by the pleading *in nullo est erratum*: and if it were not true that it was delivered to the mayor and allowed, it ought to have been denied, and is triable *per pais*; but because it is not denied, it is a manifest error. Whereupon the judgment was reversed.

If an inferior court proceed after service and allowance of *habeas corpus*, they are liable to attachment, and proceedings are *coram non judice*.

2. Roll. Ab. 495.  
8. Co. 145.  
Cro. Eliz. 33.  
Cro. Jac. 43.  
2. Jones, 209.  
2. Mod. 195.  
3. Mod. 85.  
Skin. 244.  
Salk. 140. 140.  
2. Hawk. P. C.

31. Strange, 308. 814. Tidd's Practice, 176. 7. Mod. 155. 12. Mod. 666.  
17. Cowp. 672. 1. Term Rep. 279. 3. Term Rep. 390.

See 21. Jac. 1. c. 23. s. 2.

## CASE 8.

## Wilson against Chambers.

*Trover* lies for not delivering a bond; and it is not necessary to shew the date, or to alledge the time or place of conversion.

Post. 535.

1. Roll. Ab. 5.

Cro. Eliz. 78.

98. 219. 723.

Cro. Jac. 638.

1. Roll. Rep. I.

1. Co. 56.

1. Mod. 56.

Hardres, III.

1. Salk. 219.

283.

6. Mod. 112.

Buller's N. P.

37. 46.

Gilb. Evid. 258.

Strange, 60.

576. 813. 859.

1. Com. Dig.

219, 220.

4. Com. Dig. 28.

1. Wilf. 116.

**E**RROR of a judgment in the common pleas in an action of **TROVER AND CONVERSION** of a bond of one hundred pounds, conditioned for the payment of fifty pounds on such a day, which came to the defendant's hands; and he being required such a day and year to deliver it, had not delivered it, but refused, and converted it to his own use; but no day, year, or place of this conversion was mentioned.

The defendant pleaded not guilty; and found against him, and judgment for the plaintiff.

MASTER GRIMSTON assigned for error, **FIRST**, Because no date of the bond is mentioned.—*Sed non allocatur*: for being lost and converted, he peradventure did not know the certain date of the bond; and if he should recite a date and mis-recite it, it would be a failure of his suit.

**SECONDLY**, Because he did not alledge the day nor place of the conversion (a).—*Sed non allocatur*: for the denying to deliver it upon request is a conversion, and the day, year, and place are thereby alledged; which is sufficient: and the allegation of the conversion (which hath no day or place) is not material, when there was a sufficient conversion before. Whereupon the judgment was affirmed.

(a) See 16. & 17. Car. 2. c. 8.

## CASE 9.

## Kiffin against Vaughan and his Wife.

Trinity Term, 6. Car. 1. Roll 571.

Fleadings in a *quod ei desorceat*.

**E**RROR of a judgment at the grand sessions in the county of Montgomery in a *quod ei desorceat*, in nature of a writ of right. The defendant saith, that he hath *major jus* than the plaintiff; and issue thereupon; and at the day the defendant made default, and *petit cape* awarded; and at the day of the *petit cape* returned, Edward ap Thomas prayed to be received, because the feoffment was made to the use of the said Vaughan and his wife, for the life of the wife, the remainder to the said Edward ap Thomas and his heirs. The demandant COUNTERPLEADS that receipt, traversing the feoffment; and issue joined thereupon: and at the day of return of the jury Edward ap Thomas did not appear, but one John ap Edwards, as his son and heir, prayed to be received by his guardian, he being within age; and said, that his father was dead, and he as son and heir appeared, and pleaded the same plea as his father pleaded, and prays *que le parol demurrer pur son nonage*. The plaintiff COUNTERPLEADS his receipt, taking issue upon the feoffment *ut antea*; and upon that they were at issue; and at the day the tenant by receipt made default, and a *petit cape* awarded, and at the day he did not save his default; whereupon judgment was against the tenant by receipt; and error brought.

THE FIRST ERROR assigned was, Because THE COUNTERPLEA was of the feoffment alledged, where he ought to have said of the conversion; and he cannot traverse the feoffment, but *quocunque modo* the



the reversion: and although he hath it not by feoffment, yet if he hath it by any other way, that sufficeth.

THE SECOND ERROR was, Because the receipt is admitted after receipt, which ought not to be, unless in case where the tenant by receipt dies, and his heir comes *in loco suo*.

THE THIRD ERROR was, Because the judgment was given upon the default of the tenant by receipt against the tenant by receipt, where the judgment ought to be always against the tenant to the Cro. Jac. 682. action.

And this WAS HELD a manifest error. Whereupon the judgment was reversed.

KIFFIN  
against  
VAUGHAN and  
his WIFE.

### Abraham Jennings against Vandeputt and Others.

CASE 10.

DEBT upon an arbitrament to deliver seventy-five pounds. And declares, That the plaintiff and defendants submitted themselves to the arbitrament of four merchants concerning certain accounts of pilchers, so as the arbitrament be made and delivered in writing before the twentieth of July following; and if they could not agree, then to the arbitrament of such an umpire as the arbitrators should name, so as he made his umpirage in writing before the five-and-twentieth of July following: and shews, that the four arbitrators did not make any arbitrament *ad vel ante* the twentieth of July following; but that before the twentieth of July, viz. the eighteenth of July, three of them, and the fourth arbitrator agreeing thereunto, upon the one-and-twentieth of July, by their writing dated the eighteenth of July, nominated Abraham Chamberlaine for umpire, who took the charge upon him, and before the twenty-fifth of July made an award *super pramissis*, viz. that the defendants should pay the said seventy-five pounds within a month, &c.; and for non-payment this action was brought; and upon *nil debet* it was found for the plaintiff.

GRIMSTON moved in arrest of judgment, that this nomination of the umpire before the twentieth of July (at which time they were to make their award) was not good; for they had all that time to make their award, and no time then appointed for to nominate an umpire, until after the twentieth of July.

*Sed non allocatur*: for there is no complete nomination until the agreement of the fourth arbitrator with the other three, viz. the one-and-twentieth of July; and the writing is not to have effect until that time: and it is no writing by intendment until sealed, although it be dated before; and if they had nominated the umpire before the time expired of making their arbitrament, yet it is good enough, when no arbitrament is made by them within the time. Whereupon it was adjudged for the plaintiff.

On a submission to arbitration, so as the arbitrators make their award on the 20th July, or chuse an umpire before the 25th July, the appointment of an umpire before the 20th July is void, if the arbitrators make an award before their time expires; but good if they make no award at all.

1. Roll. Ab. 262.
2. Aund. 133.
1. Mod. 274.
1. Lutw. 544.
1. Salk. 71.
2. Vent. 116.
1. Com. Dig. 391.
2. Mod. 169.
- Ld. Ray. 222.
- 671.
1. Mod. 120.
- 512.
- Kyd's Awards, 51.
3. Term Rep. 592.

## CASE 11.

## Watts against Baker.

Tender of  
amends under  
the 21. Jac. 1.  
c. 12. must be  
immediately af-  
ter the trespass  
committed, and  
before an arrest  
upon a *latitat*.

1. Roll. 538.

2. Black. 859.

3. Bac. Ab. 7.

1. Burr. 953.

956. 963.

1. Bl Rep. 208. 217. 1. Wilk 141. Tidd's Practice, 129. 5. Com. Dig. 364. 2. Hawk. P. C. 63.  
Doug. 62.

**T**RESPASS *quare clausum fregit*. The defendant pleads accord-  
ing to the 21. Jac. 1. c. 12. (a), that he tendered amends  
before the action brought, viz. the second of *October septimo Caroli*.  
The plaintiff replies, that before such tender he sued a *latitat*, tested  
the last day of *Trinity Term* before, and upon that procured the de-  
fendant to be arrested, intending to declare in trespass. It was  
thereupon demurred:—AND RESOLVED, that this tender came too  
late; for as well as a tender after an original writ comes too late, so  
after an arrest upon a *latitat*; for the tender by the statute is intended  
to be immediately after the trespass, and before any suit commenced.  
Wherefore it was adjudged for the plaintiff.

(a) See 24. Geo. 2. c. 44. s. 4. & 5.

## CASE 12.

## Anonymous.

By custom, fish  
taken in the sea  
is tithable where  
they are landed.  
Post. 339.

1. Roll. Ab. 636.  
656.

Noy, 108.

Hetl. 13.

Palm. 527.

Bunb. 43. 526.

3. Com. Dig.

101.

3. Term Rep.

385.

**A** PROHIBITION was prayed by CALTHROP to stay a suit  
upon an appeal here to the delegates from a sentence in *Ire-*  
*land* (a) for tithes of fish taken in the sea, Because fish in the sea or  
great rivers are *feræ naturæ*, and not tithable.

SECONDLY, Because the sea is not within any parish; so as no  
spiritual person can say it is within his parish where the fish is  
taken.

But the prohibition was denied; for tithes of fishes are usually  
paid in *Ireland*, as JONES, *Jusice*, affirmed. And it was said in  
*Cornwall*, they pay tithes for fishing in the sea to the parson of the  
parish where they are landed; and it is a custom in *Yarmouth*, that  
tithes shall be paid for herrings.

(a) See the statutes 22. Geo. 3. c. 53. and 23. Geo. 3. c. 28. by which this appeal  
is now abolished. Post. 512.

## CASE 13.

## Hopestill Tyndal's Case.

*Ante*, Page 252.

A *pluries certio-*  
*rari* directed to  
the mayor and  
jurats of one of  
the *Cinque Ports*  
to remove an  
indictment of  
felony.

See S. C. ante,  
252.

Post. 291.

1. Roll. Ab. 395.

Cap. Jac. 543.

2. Hawk. P. C.

400.

Doug. 749 751.

3. Term Rep.

653.

**A** CERTIORARI being awarded to the mayor and jurats of  
*Hithe* to remove an indictment taken there against *Hopestill*  
*Tyndal*, who was indicted before them for buggery; they returned  
upon the writ, that it is one of the *Cinque Ports*, and that they have  
a privilege there, and of time whereof, &c. that no writ out of the  
king's courts runs there, but it must be directed to "The Warden  
" of the *Cinque Ports*," who should send them, and then they were  
returned, and not otherwise.

It was moved, that this is an ill return, and that they had not  
any such liberty; for they may not meddle with matters of the  
crown, because it is saved in *MAGNA CHARTA*. Whereupon it  
was prayed, that it might be disallowed. and that a *pluries certiorari*  
might be awarded against them, commanding them to certify the  
indictment

indictment at such a day, and then to be in person to shew their charters and evidence for their pretended claims, and to answer their contempt in not returning the record upon the first writ.

HOPKINS  
TYNDAL'S  
CASE.

Now, the King's Attorney, shewed a record in *Easter Term*, 43: *Edw. 3. Roll 19.* out of the treasury of the exchequer, viz. A writ being awarded out of the chancery to the mayor and commonalty of London, to certify an indictment there taken against one *Lumbard* for engrossing of silk, upon the *alias* they made such return, that by ancient charters, confirmed by parliament and ancient usage, they had such a privilege, that all indictments and proceedings for any cause unless for felony should be tried and determined there, and not elsewhere; and hereupon a *pluries* was awarded to return this indictment into chancery, and that they should be there at the same day to shew their evidence and charters to maintain their claim, and to answer their contempt; and at the same day they returned all their evidence and proceeding there (a); and so it was prayed that such course should be observed here.

(a) 1. Keb. 352. 572.  
Raym. 74.  
3. Mod. 230.  
Hard. 402. 419.  
1. Sid. 155. 230.  
1. Burr. 386.  
1. Bl. Rep. 230.  
2. Hawk. P. C. ch. 25. f. 97.

And THE COURT awarded accordingly a *pluries certiorari*, directed to the mayor and jurats.

(a) See 5. Will. & Mary, c. 11. f. 2.

### Goodyear against Bishop.

CASE 14.

**A**CTION FOR WORDS. Whereas the plaintiff is, and for divers years hath been, a merchant, and used the trade of a merchant; that the defendant, having communication with one *Har- ris* of the plaintiff, to scandalize him and deprive him of his means of living, said of the plaintiff these scandalous words: "He (*innu- endo* the plaintiff) is not worth a groat, he is a hundred pounds worse than nought."

To say of a merchant that he is 100l. worse than nothing is tantamount to calling him a bankrupt.

After verdict for the plaintiff in London, and one hundred marks damages given, it was moved in arrest of judgment, that these words are not actionable, for he doth not shew that he spake of him as in relation to his profession, nor called him bankrupt.

But ALL THE COURT held, that these words of a merchant who lives upon his credit, which is the principal means of his gains, are very scandalous, and tantamount as if he had called him bankrupt. Wherefore it was adjudged for the plaintiff.

### Johnson against Sir Henry Rowe.

CASE 15.

**P**ROHIBITION; for that THE PRIOR of the Salutation of the order of THE CARTHUSIANS was seised in fee of a house and grange called *Bloomsbury*, in the parish of *St. Giles*, and of such lands in the tenure of the plaintiff; and that he and all his predecessors, until the day of the dissolution, held them discharged of

In prohibition on discharge from tithes, if the defendant plead an agreement with the abbot, that the discharge should not extend to the lands when in the occupation of lessees, and traverses the discharge without shewing title in the abbot, the inducement is bad. Post. 336. 514.—Hob. 321. Cro. Eliz. 671.

discharge should not extend to the lands when in the occupation of lessees, and traverses the discharge without shewing title in the abbot, the inducement is bad. Post. 336. 514.—Hob. 321. Cro. Jac. 86. Jones, 318.

tithes;



JOHNSON  
against  
SIR HENRY  
ROWE.

tithes; and so seised, the 29. *Hen. 8.* surrendered them to the king; and pleads the statute of 31. *Hen. 8. c.* . and conveys the interest from the king to the plaintiff, &c.

The defendant pleads, that, 1st *May* 1422, it was agreed betwixt the master of the hospital of *Burton Lazars* and the said prior, that when the lands of the manor of *Bloomsbury* were in the hands of the tenants or fermors of the prior that tithes should be paid; and when the lands should be in the hands of the prior himself, that they should not pay tithes, but then they should have six kine-gate, in such a pasture of, &c. in lieu of the tithes; and conveys the possession of the hospital to the king by surrender, and from the king to the defendant; and TRAVERSETH, that the plaintiff now holds the lands discharged of tithes, &c.

The plaintiff thereupon demurs.

And IT WAS ADJUDGED for him, that the plea is ill, and no good inducement to the traverse; for he makes no title to the master of the hospital for tithes, but only pretends an agreement, but doth not entitle him to the tithes, nor shews that he was seised of them in fee, nor doth shew any thing for which they might make such an agreement: also, he doth not shew the agreement to be by writing; and the inducement of a traverse ought to be always sufficient. Whereupon it was adjudged for the plaintiff.

## CASE 16.

## The King against Warde and Lyme.

An ancient highway cannot be changed without the king's licence first obtained on an *ad quod damnum*, although an inquisition find that it is no damage to the king to grant a licence.

Vaughan, 341.

Yelv. 141.

1. Burr. 465.

2. Com. Dig.

397.

1. Hawk. P. C.

367.

**I**NFORMATION. Whereas there was from the time whereof, &c. a common highway in *Cold-Ashby*, in a lane called *Crick-lane*, leading to divers market-towns, as well for horsemen as for footmen and for carriages; that the defendants, on the first of *June*, 7. *Car. 1.* with hedges and ditches erected cross the lane, inclosed and stopped the said way, and held it inclosed and stopped, whereby, &c.

The defendants confess, that there was such a common highway *prout* in the information, and that they inclosed and stopped it; but they say, that the said way was so foul, and surrounded with water and dirt, that passengers could not pass there without great danger; and that before the stopping of the lane, *viz.* on the 30th *May*, 7. *Car. 1.* for the profit and ease of the passengers, one *Carew Sands*, being seised in fee of a close adjoining to the said lane, laid out another way more commodious for the king's people there to pass; and before the laying out of that way, *viz.* 18th *May*, 7. *Car. 1.* A WRIT OF AD QUOD DAMNUM issued to enquire, Whether it were to the damage, &c. if the king should grant such licence to the defendants to stop the said way? And thereupon an inquisition was taken, 31st *May*, 7. *Car. 1.* that it was not to the damage, &c. if the king should grant such licence, &c. for that another way is laid out as beneficial for the people; *absque hoc*, that they inclosed and stopped it with hedges, &c. *ad commune nocumentum*, &c.

THE

THE ATTORNEY GENERAL upon this demurred.

It was now moved, that this plea was ill in matter and form, because the allegation that *Carew Sands* laid out another way more beneficial for the king's people, not appearing by what authority he did it, is not good; for it is but at his pleasure, and he may stop it when he will; and by the laying out the subjects have not such an interest therein as that they may justify their going there; nor is it any such way that the inhabitants are bound to watch there; or to make amends if any robbery be there committed, nor is any person liable to repair and maintain it: also the pleading the issuing of the *ad quod damnum*, and the inquisition thereupon, is to no purpose when he doth not plead that he obtained licence, for that is only on purpose to enable him to obtain licence (a); and therefore the plea is ill. *Vide Register*, 253. & 255.

ANOTHER EXCEPTION was taken, Because the traverse is ill, that he did not inclose *ad nocumentum*, &c.

THE COURT therefore for these reasons held the plea ill, and gave rule for judgment.

(a) *Vide* 13. Geo. 3. c. 78. l. 19.

THE KING  
against  
WARDE and  
LYME.

Michaelmas

# Michaelmas Term,

## 8. Car. 1. In the King's Bench.

*Sir Thomas Richardson, Knt. Chief Justice.*

*Sir William Jones, Knt.*

*Sir George Croke, Knt.*

*Sir Robert Berkley, Knt.*

*William Noy, Esq. Attorney General.*

*Sir Richard Sheldon, Knt. Solicitor General.*

} *Justices.*

### CASE 1.

*Berkley and Crawley promoted on the deaths of Whitlock and Harvey, Justices.*

### Memorandum.

IN the vacation *SIR JAMES WHITLOCK*, one of the Justices of the king's bench, died in his house at *Fauly* in the county of *Bucks*, and *SIR FRANCIS HARVEY*, one of the Justices of the common pleas, died at his house in *Northampton*; and *SIR ROBERT BERKLEY*, the *King's Serjeant*, of the *Middle Temple*, was made and sworn Justice of the king's bench the eighteenth of *October*, and *FRANCIS CRAWLEY*, the *Queen's Serjeant*, was made and sworn Justice of the common pleas the same day.

### CASE 2.

### Halley against Stanton.

*Trinity Term, 8. Car. 1. Roll 1405.*

"He was arraigned for stealing hogs" are actionable words.

*S. C. Jones, 299.*

*1. Roll Abr 64.*

*4. Co. 16.*

*Cro. Eliz. 279.*

*Cro. Jac. 154.*

*Hob. 177. 219.*

*1. Will. 300.*

ACTION FOR WORDS. Whereas he had been always of good conversation, and never touched with any suspicion of any matter of felony, and used the trade of buying and selling of cattle, and thereby gained his living; that the defendant maliciously spake these words of the plaintiff, "He" (*innuendo* the plaintiff) "was arraigned at *Warwick* for stealing of twelve hogs, and if he had not made good friends it had gone hard with him;" *unde* revera he never was arraigned nor questioned for any felony.

After verdict upon not guilty pleaded, it was found for the plaintiff, and damages twenty pounds.

*CREW, Serjeant*, now moved an arrest of judgment, that these words are not actionable; for to say, "he was arraigned for felony," is not any cause of action, no more than to say, that one was "detected for felony;" for good and honest men may be suspected or arraigned for felony; and in the Case of *NOELL, an attorney* (a), "You were cooped up for forging of writs," it was adjudged the action lies not.

BUT ALL THE COURT *seriatim* delivered their opinions, that the action lies; especially as in this Case it is alledged, that he falsely and maliciously spake these words, adding, "if he had not made good friends it had gone hard with him," which shews that he conceived he was guilty of such an offence; and when it is merely false, as it appears by averment that he never was arraigned for any felony, nor ever committed any, it is the more malicious; and being spoken in disgrace that none should trust him, it therefore differs from the Case cited, and from the Case of *Bayly vs. Churington* (b), where an action was brought for saying these

(a) *31. Eliz.*

(b) *Cro. Eliz. 279. in C. B.*



words, "Thou wert arraigned for two bullocks;" and after verdict upon not guilty found for the plaintiff, it was adjudged, that the action lies not, because he doth not say, "for stealing of bullocks," nor that any felony was committed, nor avers that he never was arraigned for felony as here. The case of *Hayns v. Spratt* (a) was also cited, for saying, "Thou wert in *Norwich* gaol for a robbery committed upon *James Steward*," with an averment that he never was in any gaol for felony, and it was adjudged that the action lay. Whereupon it was here adjudged for the plaintiff.

(a) Cro Jac. 247. See Hob. 177.

HALLEY  
against  
STANTON.

### Southold against Daunston.

CASE 3.

Trinity Term, 8. Car. 1. Roll 868.

**A**CTION FOR WORDS. Whereas he was of good name and fame, and was in communication to be married to such a woman, with whom he should have had such a portion; that the defendant, to scandalize him, and to hinder and deprive him of his marriage, spake these words of the plaintiff, "*Southold* hath been in bed with *Dorchester's* wife," whereby he lost his marriage. After verdict upon not guilty pleaded, and found for the plaintiff,

BING, Serjeant, moved, that these words are not actionable; for it may be, he was in bed with her when he was a child, she being his nurse, or it may be that her husband was in bed betwixt them; and words shall be taken in *mitiori sensu* when any construction can be made to help it.

But JONES and MYSELF conceived, that being spoken to disgrace him and deprive him of his marriage, and he shewing that he was deprived of his marriage, he hath good cause of action, and such foreign intendments as have been alledged shall not be taken, but it shall be adjudged *ex effectu dicendi*, which is here to hinder him of his marriage, as it is now found by the verdict; but they would advise thereof.—And it was afterwards adjudged for the plaintiff.

To accuse another of adultery per quod he lost his marriage, is actionable. Ante, 155. Post, 322.  
1. Roll. Abr. 35.  
Cro Jac. 323.  
1. Com. Dig. 158.  
Bull N. P. 6.  
2. Term Rep. 474.

### Favely against Easton.

CASE 4.

Hilary Term, 6. Car. 1. Roll 1075.

**E**JECTMENT of a messuage and two hundred acres of land, fifty acres of meadow, and twenty acres of wood in *Bishops Marchard*. Upon not guilty pleaded, and a special verdict, it appeared, that *John Easton*, tenant in tail to him and the heirs males of his body, of this messuage and land called *Easton's*, lying in *Bishops Marchard*, levied a fine thereof by the name of a messuage and two hundred acres of land, fifty acres, &c. in *Effington*, *Easton* and *Chilford*, to the use of him and his heirs; and they find, that there is not any vill or hamlet or place known by the name of the messuage or tenement called *Easton's*, out of the vills or hamlets, and that none of the said tenements either be or were in *Effington* or in *Chilford*.

The question was, Whether, upon this matter found, a fine levied of lands in places known in a vill, not mentioning the vill or hamlet where the lands are, be good?

A fine levied of land called *Easton's* lying in *Marchard*, by the name of so many acres of land lying in *Effington*, *Easton*, and *Chilford*, is good, although there is not any land known by the name of *Easton's*, nor any so called in *Marchard* or in *Effington*, or in *Chilford*.

Post, 276.—Jones, 304. Godb. 440. Cro. Jac. 574. 1. And. 245. 1. Vent. 143. 170. 1. Mod. 256. 3. Com. Dig. 346. 2. Bac. Abr. 544, 545. Cruise, 125. Cowp. 725.

GRIMSTON

FAVELY  
against  
EASTON.

GRIMSTON argued, that it is not good; for a fine ought to be of lands in a vill or hamlet, naming the vill or hamlet wherein they lie, or the places known out of every vill or hamlet, but not of land in places known in a vill; as here, a place known without mentioning the vill.

But CALTHROP, for the plaintiff, argued, that the fine is good, because it is a personal action; and although the covenant be real in respect it concerns land, yet the action is personal; and as personal actions may be brought of land in places known, by the same reason fines may be levied. *Vide* 1. Hen. 5. pl. 9. per HALES, 21. Edw. 3. pl. 14. 38. Edw. 3. pl. 20. 29. Edw. 3. pl. 10. 7. Edw. 6. "Fines. BROOK, 9. pl. 44. For A SECOND REASON, a fine is but an assurance by agreement betwixt the parties, which may be by such names as the parties agree; and he cited for that a case in this court, of *Munck v. Butler* (a).

And RICHARDSON and JONES were of this opinion, and MYSELF agreed with them; for a fine, being but an assurance, is favourably to be taken; as a recovery of an advowson or pension, though it be not proper, yet being suffered, hath been adjudged good, because it is but a common assurance, although not allowable in other actions, as in *Dormer's Case* (b) is resolved; so this fine, being levied and recorded, is good enough.

But THE COURT would advise further thereof (c).  
(c) It was moved again, and adjudged for the plaintiff, post. 276.

(a) Cro. Jac. 574.

(b) 5. Co. 40.

#### CASE 5.

#### Cawdry against Highley, alias Tythay.

An action lies for saying of a doctor of physick that "he is no scholar," without averring that there was at the time a colloquium concerning his profession.  
Post. 382.

Godb. 441.  
1. Roll. Ab. 54.  
Cro. Eliz. 620.  
Winch. 40.  
Hetley, 69. 175.  
1. Mod. 19.  
11. Mod. 221.  
Ld. Ray. 1480.

**A**CTION FOR WORDS. Whereas the plaintiff was of good conversation, and exercised in the practice of physick as well in London as in the county of Lincoln and other places, and by reason of his knowledge in the said art was, about twenty years since, made doctor of physick in Cambridge according to the course of the university, and practised and ministered physick to divers noblemen and others for twenty-one years last past; that the defendant *præmissorum non ignarus*, out of malice, to scandalize him with his patients, and to withdraw them from meddling with him, said of the plaintiff, and to the plaintiff, in the presence and hearing of divers, "Thou art a drunken fool and an ass; thou wert never a scholar, and art not worthy to speak to a scholar, and that I will prove and justify."—After not guilty pleaded, and found for the plaintiff,

HUTTON moved, that the action lies not: for he doth not shew there was communication with any concerning his skill in physick, or his practice therein; and the first words, "Thou art a fool and an ass," are but words of scorn, and the other words touch him only in scholarship, and not in his art, and a physician may be no good scholar, and yet a good physician. And it was compared to *Buckley's Case*, for saying of an attorney, that "he is a corrupt man;" unless there be conference of his profession the action lies not.

RICHARDSON, Chief Justice, said he was of that opinion, but he would advise.—Afterwards, in *Trinity Term*, 9. Car. 1. it was adjudged for the plaintiff.

Manning

## Manning and his Wife against Fithherbert.

CASE 6.

**A**CTION UPON THE CASE; for that the defendant *ex malitia* upon the plaintiff's wife *crimen felonice imposuit*, and had caused her to be brought before Mr. Gregory, a justice of peace of the county of Oxon, *et falsò et malitiosè* said before him *ad tunc et ibidem*, "that he charged her with felony for stealing of an hog from one Hundby his cousin," and required that she might be bound over to the assizes, whereupon she was enforced to find sureties for her appearance at the assizes. After verdict upon not guilty pleaded, it was found for the plaintiff, and forty shillings damages assessed.

LITTLETON, Recorder of London, moved in arrest of judgment, that the action lies not: FIRST, Because they do not say, that the defendant *falsò* imposed upon her the crime of felony. SECONDLY, For that they do not shew the day and place when and whither he caused her to be brought. THIRDLY, Because they join actions for words and in nature of a conspiracy together.

*Sed non allocatur*: for when they say, that the defendant "*ex malitia*" imposed *crimen felonice*, that implies "*falsò*;" and when it is said, he caused her to be brought before a justice of the peace, that is coupled with the other, and shall be intended the same time and place, especially when it is afterwards that he *ad tunc et ibidem* charged her with felony. And for the other matter, it is not in nature of a conspiracy, but an aggravation of the false and malicious accusation. Whereupon it was adjudged for the plaintiffs.

In an action for malicious prosecution, the word "*malicious*," implies that the charge was "*false*," and the day and place where it was made shall be intended the same to which *ad tunc et ibidem* relate.

Post. 276. 525.  
Dyer, 23. in marg.  
Keilw. 100.  
Cro. Jac. 362.  
2. Hawk. P. C. 263.  
Doug. 215.  
1. Term Rep. 493.  
2. Term Rep. 225.  
4. Term Rep. 247.

## Chapman against Allen.

Hilary Term, 7. Car. 1. Roll 419.

CASE 7.

**A**CTION OF TROVER of five kine. Upon not guilty pleaded, a special verdict was found, that one Belgrave was possessed of those five kine, and put them to pasturage with the defendant, and agreed to pay to him twelve pence for every cow weekly as long as they remained with him at pasture; and that afterwards Belgrave sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time that they had been with him, which amounted to ten pounds: afterwards one Foster paying him the said ten pounds by the appointment of Belgrave, he delivered the five beasts to Foster: and if *super totam materiam* he be guilty, they find for the plaintiff, and damages twenty-five pounds; and if, &c. then for the defendant.

JONES, Justice, and MYSELF (*absentibus cæteris Justiciariis*), conceived, that this denial upon demand, and delivery of them to Foster, was a conversion, and that he may not detain the cattle against him who bought them until the ten pounds be paid, but is enforced to have his action against him who put them to pasture. And it is not like to the cases of an innkeeper or taylor;

If a man take in cattle to depasture on a contract at so much a head per week, he cannot detain them against the vendee of the owner for the value of the agistment, unless there is a special agreement to that effect.

Hob. 42.  
Yelv. 67. 178.  
Moor, 877.  
1 Vent. 268.  
12. Mod. 482.  
Cro. Eliz. 622.  
Finch Law, 180.  
Bull N. P. 45.

they



CHAPMAN  
against  
ALLEN,  
(a) 1. Com.  
Dig. 211.

they may retain the horse or garment delivered them until they be satisfied (a), but not when one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them. Whereupon rule was given, that judgment should be entered for the plaintiff.

## CASE 8.

Johns against Staynar.

Hilary Term, 8. Car. 1. Roll 343.

In ejectment,  
if the *ouster* be  
alleged after  
the *teste* of the  
original, the  
judgment is  
erroneous.

Ante, 90.

Post. 282 575.

S. C. Jones, 304.

Yelv. 70.

Cro. Jac. 70.

561.

1. Leon. 186.

104.

3. Leon. 51.

1. Sid. 307.

308.

Hob. 198.

Carth. 114.

2. Lev. 141.

Cro. Eliz. 325.

1. Show. 147.

1. Will. 171.

1. Bac. Abr. 92.

Str. 877. 1. Com. Dig. 106. 320.

**E**RROR of a judgment in ejectment, Because the original writ doth not warrant the declaration, for the original bears date 24 January, 6. Car. 1. and the ejectment is supposed 31 January.

After verdict upon not guilty pleaded, and found for the plaintiff, and judgment entered, this error was assigned, and upon diminution alleged the writ was certified, and the defendant pleaded in nullo est erratum.

ROLLE now moved, that it is good notwithstanding; for the writ was returnable *Craftino Purificationis*, and the trial was upon the issue joined *Trin. Septimo Caroli*, and there doth not appear any continuance upon this; wherefore it shall be intended, that another original writ was brought, which is wanting and not certified; and compared it to the Case of *The Bishop of Worcester*, where the declaration was of a lease by himself in an ejectment, and the writ certified was of a lease by his predecessor, and holden, that it should not be intended the original, whereupon the action was brought. Also, where an action is brought and tried in *Middlesex*, and the original certified in *London*, it shall be intended not to be the same original, but rather that it was a verdict without an original, which is aided by the statute where there is no original (a).

(a) It was moved again in Michaelmas Term, and the judgment reversed. Post. 282.

## CASE 9.

Harris against Richards.

Trinity Term, 7. Car. 1. Roll .

*Assumpsit.*

**A**SSUMPSIT. Whereas one Bond was bound to the plaintiff in an obligation of forty pounds for the payment of twenty pounds; and whereas the defendant was bound to one Hodges in an obligation of one hundred pounds, dated 5 February, 19. Jac. 1. for the payment of fifty-five pounds the fifth of February following; and the said twenty pounds and fifty-five pounds being due and not paid, that the defendant, the first of February 1624, which was in the twenty-second year of James the first, in consideration the plaintiff would forbear the payment of the twenty pounds until 1627, and in consideration the plaintiff would compound with the said Hodges for the said fifty pounds, and the interest then due, and deliver the said bonds into his hands, assumed to pay to him the said twenty pounds and the said fifty pounds, and all the interest, which he should pay or compound for; and alleges in fact, that he did forbear the said twenty pounds, and upon the first of March 1624 paid

paid the said fifty pounds, and fifteen pounds for interest, and obtained the said bond into his hands; and that upon such a day, year, and place, he gave notice thereof to the defendant; and required of him payment thereof according to his promise, who had not paid it; and therefore he brought this action.

HARRIS  
against  
RICHARDS.

After verdict for the plaintiff, GERMYN and CALTHROP moved in arrest of judgment, that this action lies not; for it is no lawful consideration to pay interest.—*Sed non allocatur*: for it is to compound a forfeited bond; which is a good consideration: also, it is no unlawful consideration to pay interest, not being more than is permitted.

The taking of reasonable interest for the use of money was permitted by the common law.

Cro. Jac. 379.

1. Com. Dig. 148. 1. Hawk. P. C. 528.

The SECOND EXCEPTION was, That there was not any consideration why the defendant should pay the twenty pounds, for he had not any benefit thereby.—*Sed non allocatur*: for it is a sufficient consideration that the plaintiff at his request would forbear it.

A promise to pay money in consideration of the forbearance of a debt will

maintain an action. Ante, 70. 77. 242. Post. 409.—1. Roll. Ab. 25. 2. Roll. Ab. 782.

THE THIRD EXCEPTION, That it is not alledged he gave notice what he paid for the composition, nor the place nor time.—*Sed non allocatur*: for upon the view of the record it appeared, that the said day and place of the notice were set down.—And JONES conceived, if there had not been such a precise notice of the quantity he paid, and when, yet being expressly alledged that he paid so much, and required it, and that it was not paid upon request, it had been sufficient.—Wherefore it was adjudged for the plaintiff. And error being afterwards brought, the judgment was affirmed.

Notice.

### Burgaine against Spurling.

CASE 10.

Trinity Term, 7. Car. 1. Roll 373.

**EJECTMENT.** Upon a special verdict the case was, *Thomas Jackson*, a copyholder, 20th April, 6. Car. 1. surrendered a copyhold messuage and twenty acres of land, parcel of the manor of *Hurst*, into the hands of two tenants of the manor, to the use of *Hutchinson* and his heirs, upon condition, that if he paid the said *Hutchinson* 1060l. upon the first of July following, that the surrender should be void. And they find the custom of the manor to be, that the copyholder may surrender his copyhold into the hands of two tenants of the manor; and that the 25th of May, *sexto Caroli*, before the payment of the said money, he surrendered an acre, parcel of the twenty acres, into the hands of two tenants of the manor, to the use of *William Jackson* and his heirs, and afterwards the surrenderor paid the said 1060l. according to the condition, and then surrendered the said tenements into the hands of the steward of the manor, to the use of *Richard Price* and his heirs; and afterwards, the 8th of October, *sexto Caroli*, being the first court after these surrenders made, the two last surrenders were presented, and the said *William Jackson* was admitted to the said one acre surrendered to the use of him; and the said *Richard Price* was admitted at the same court to the said messuage and twenty acres, whereof the said one acre was parcel, according to the surrender made to the use of him; and that the said surrender to the use of

If a copyholder surrender his estate to the use of A. upon condition that if he pay the said A. such a sum of money at a particular time, the surrender shall be void; and before performance of this condition he makes another surrender to B. and after condition performed makes another surrender to C. which two last surrenders are presented; the first surrender not having been presented at the next court is

void, and therefore the second surrender good. Post. 283.—1. Roll. Ab. 500. Co. Lit. 60. note (2). 1. Will. 13. 1. Com. Dig. 542. 2. Com. Dig. 459. 1. Bac. Ab. 462. 1. Ter. Rep. 600. 2. Ter. Rep. 484.

*Hutchinson*

BURGAINÉ  
against  
SPURLING.

*Hutchinson* was never presented; and that there is a custom within the manor, that if any surrender be made out of court to the use of another, and be not presented at the next court, it is merely void; and that the said *Richard Price* entered into the said one acre and made a lease to the plaintiff; and the defendant, by command of the said *William Jackson*, ousted him.

Gilb. Tén. 251,  
252. 280.

The sole question was, Whether this surrender of the acre before the condition performed be good or not?

GRIMSTON argued for the plaintiff, that the surrender before he hath performed the condition is merely void, for all the interest is out of him, and then he hath not any power to make a surrender; but he agreed, that after the condition is performed the estate is reverted in him, and he may make a surrender.

CALTHROP, for the defendant, argued, that this surrender upon condition, the condition being performed before the next court, and the surrender not presented, the surrender is as if it never had been made; and after such surrender, and before the condition performed, the copyholder remains still interested, 4. Co. 28. and the estate was never out of him; so his surrender to another, he being admitted, is good.

JONES and MYSELF were of this opinion; but *cæteris absentibus*, Adjournatur (a). 3. Levinz. 385.  
(a) It was moved again this Term, and judgment given for the plaintiff. See post. pages 283, 284.

## CASE II.

## Waller and Petty against Sands.

Trinity Term, 2. Car. 1. Roll 374.

A reversioner cannot sell the timber-trees during the life of a tenant for life without impeachment of waste.

Ante, 242.  
1. Roll Rep. 182.  
Litch, 270.  
Allen, 280.  
4. Co. 63. a.  
11. Co. 84.  
Moor, 327.  
Co. Lit. 220. a.  
2. Vern. 738.  
5. Bac. Ab. 491.  
2. Eq. Caf. 759.  
2. Ask 283.  
1. Com. Dig. 602.  
1. Term Rep. 55.

TROVER AND CONVERSION of two hundred loads of timber and two hundred loads of stockwood. Upon not guilty pleaded, and a special verdict, the case was,

Tenant for life without impeachment of waste, excepting voluntary waste, he in the reversion bargains and sells the timber trees growing upon the said land to the plaintiff. The tenant for life cut down the trees, and sells them to the defendant, and he sells them to one *Green*.

The question was, Whether the bargainee of the trees shall have an action of *trover* against the vendee of the tenant for life, the tenant for life cutting them and selling them being yet alive, as it was found by the verdict?

HYDE, for the defendant, argued, that he shall not; for during the life of the tenant for life, although the lessor, or he in reversion, hath a general property, yet he hath no authority to sell them, the tenant for life having a particular interest and authority in them; and his sale being void, his bargainee hath no interest to maintain the action.—*Vide* 21. Hen. 6. pl. 46. *Dyer*, 90. 10. Co. *Lyford's Case*, 48. b. Co. Lit. 220. a. *Bowls' Case*, f. 82. a. Et adjournatur.

## CASE 13.

## Le Marchant against Rawson.

Trinity Term, 7. Car. 1. Roll 732.

In debt on the DEBT upon the 2. Edw. 6. c. . for not setting forth of tithes. The defendant pleaded *nil debet*; and it was found against him, "debt," and the jurata in the *nisi prius* record be "in trespass," the mistake may be amended after verdict. 1. Roll. Ab. 202. Hob. 246. Cro. Jac. 528. 3. Bac. Abr. 275.



GERMYN moved in arrest of judgment, that it was a mis-trial, and without sufficient warrant; for the *jurata* upon the *nisi prius* are, that "*jurat. ponitur in respectum inter LE MERCHANT plaintiff, et RAWSON defendant, in placito transgressionis, usque post Octab. Mich. nisi prius, &c.*;" so by this *jurata*, which is the warrant of the justices of *nisi prius*, there is not any authority to try the issue; and it was held a plain misprision.

LE MERCHANT  
against  
RAWSON.

But the question was, Whether after trial this be not amendable, for all the roll was well? The issue was in *debt*, and it was a mere misprision of the clerk to make it in a plea of *trespass*, where it ought to have been in a plea of *debt*: and the *jurata* is not the sole warrant to the justices of *nisi prius* to proceed, for the writ of *distringas* is to try the issue "*in placito debiti, nisi prius, &c.*;" so that is a warrant to proceed, although the record of *nisi prius* doth not warrant it. And it hath been ruled, that where, upon such writ of *distringas*, the sheriff returns *nomina jurator. inter A. querent. et B. defendant. in placito transgressionis*, where the writ (to which the pannel is annexed) is in *placito debiti* (being but a misprision of the sheriff's clerk in mis-reciting the writ) it shall be amended. Wherefore THE COURT would advise thereof (a).

Cowp. 407. 425.  
Doug. 116. 135.  
1. Term Rep.  
783.

Court were unanimously of opinion, that it might be amended.

(a) It was moved  
again, and the  
Post. 278.

### Gryffyth against Biddle.

CASE 13.

TRESPASS for taking a bullock and selling it. The defendant justifies, Because at the sheriff's tourn, held *infra mensem Pasch.* viz. 18th April, 6. Car. 1. the plaintiff was presented for not appearing at the said tourn, being *debito modo summonitus*, and amerced by the jury, which was affected by four of the jury at forty shillings. At the next assizes of the peace, viz. 22 April, it was certified and ratified by such justices of peace; whereupon the steward made a warrant unto him to levy it, and so sold, &c. Upon this plea it was demurred.

Error in a justification to trespass as bailiff to the steward of a tourn.  
1. Roll. Ab. 525.  
526.  
Jones, 300.  
1. Bac. Ab. 100.

TROTMAN, for the plaintiff, took three exceptions. FIRST, Because the defendant doth not alledge that the tourn was kept *infra mensem post festum Paschæ*, but *infra mensem Paschæ*, which may be as well before Easter as after; and by the 21. Edw. 3. c. 15. the tourn ought to be kept *infra mensem post festum Paschæ, et post festum Sancti Michaelis*. So where the sessions of the peace is appointed to be kept at one place, *et non alibi nisi propter pestilentiam*, being kept in another place, it was held void. 7. Hen. 6. pl. 12. 28. Hen. 6. pl. 7. 8. Hen. 7. pl. 4. Dyer, 137.

How the keeping of a sheriff's tourn shall be alledged in pleading:  
S. C. Jones, 300.  
2. Inst. 72.  
2. Leon. 28. 74.  
Cro. Eliz. 125.  
2. Saund. 290.  
Cro. Jac. 167.  
S. P. C. 84.  
1. Vent. 107.

THE SECOND EXCEPTION, Because the amercement is alledged to be made by the jury, and affected by four of the jurors, whereas it ought always to be assessed by the Court; for it is a judicial act, and shall be affected by the assessors appointed. *Old Entries*, 507. *New Entries*, 119.

An amercement in a tourn must be by the Court and not the jury?  
2. Co. 39.  
J. Jones, 301.  
1. Ear. K. B. 414.

Strange, 847. 2. Hawk. P. C. c. 10. s. 18. 4. Com. Dig. 176. Fitz. 109. 1. Sec R. v. Ritson, 2. Term Rep. B. R. p. 186. and the cases in note (b).

THE THIRD EXCEPTION, That the amercement was levied by the defendant, as bailiff, by warrant from the steward of the court; whereas by the 1. Edw. 4. c. 2. it is expressly appointed, that

Amercements in the sheriff's tourn must be levied by process from the justices.  
J. Jones, 301.

GRAYFITH  
against  
BIDDLE.

1. Jones, 301.

2. Hale, 70. 142.

Staunf. 87.

4. Edw. 4. pl. 31.

Fitz. Torn. 3.

2. Hawk. P. C.

93. III.

no fine or amercement in the tourn shall be levied, unless it be certified at the next sessions of the peace by indenture, and inrolled there, and by process made from the justice of the peace of the sessions to the sheriff; and none of these circumstances were here observed: wherefore the levying by warrant from the steward was ill, and therefore, &c.—ALL THE COURT was of this opinion; and therefore it was adjudged for the plaintiff.

CASE 14.

Favely against Easton.

Vide Ante, page 269.

A fine of lands in places known in a vill is good, without mentioning the vill where the lands are.

S. C. ante, 269.

Jones, 301.

Godb. 440.

3. Com. Dig.

345, 346.

2. Bac. Ab. 544,

545.

Cruise, 125.

THIS Case was now moved again, and argued by HEDLY, Serjeant, for the defendant, that this fine is not good. He agreed, that of places known out of any vill or hamlet a fine may be levied for necessity; as a *præcipe* may be brought of a *ferry* in places known out of any vill or hamlet, as 34. Hen. 6. pl. 1. 8. Edw. 4. pl. 6. is: but a fine cannot be of lands in a vill or hamlet by the name of a place known, for the vill being the principal ought to be named; and the place known may be known by one name one day, and at another day by another name, according to the name of the parties who are owners thereof; and a fine ought to be levied by a name certain, because it is to bind a stranger, by 12. Edw. 4. pl. 37. and 3. Edw. 4. pl. 27. Addition, in a writ of debt or other action where process of outlawry lies, ought not to be but of the vill or hamlet, and not of the place known; wherefore this fine being of lands in a place known within a vill is not good.

NOY, Attorney General, *à contra*. The fine is good, for the fine is drawn according to the writ of covenant, and the writ of covenant is guided by the indenture and agreements of the parties, viz. what they agree to pass by such names, and it ought not to vary; and if it vary from the deed, the other is not bound to levy the fine: and he relied upon THE YEAR-BOOKS, 21. Edw. 3. pl. 14. 1. Hen. 5. pl. 9. 29. Edw. 3. pl. 11.

And ALL THE JUSTICES *seriatim* delivered their opinions, that it was a good fine. Whereupon it was adjudged for the plaintiff.

CASE 15.

Smith against Hodgeskins.

Easter Term, 8. Car. 1. Roll 104.

To an action for saying, "I charge you with FELONY," it is

no justification that the plaintiff assaulted the defendant, and that he used these words to induce the constable to take him into custody for the assault

Ante, 271.

S. C. Jones, 302.

1. Roll. Abr. 43.

3. Ter. Rep. 183.

ACTION FOR WORDS; for that the defendant *malitiosè et falsò crimen felonix ei imposuit*, and caused him to be arrested for felony.

The defendant pleads, that the plaintiff assaulted him upon the highway near *Highgate*, and beat him: whereupon he complained to the constable of this matter, and desired the constable to attach him; and he refused, unless the defendant would say that "he charged him with felony;" which speaking, occasioned as aforesaid, is the speaking.

The plaintiff upon this plea demurs.

GRIMSTON now moved, that this is no colour of plea, for the defendant doth not shew any cause to charge him with felony; therefore it is no excuse or cause of justification of these words.

ALL

ALL THE COURT were of this opinion; and gave rule for judgment for the plaintiff, unless, &c.

SMITH  
against  
HODGESKINS.

AFTERWARD, at the day given, the defendant by WARD moved, that the action lies not for these words; for it is, that *crimen felonie ei imposuit*, which is not in itself cause of action: and for that he cited the case of *King v. Mellor (a)*, where an action on the case was brought, because *crimen felonie ei imposuit*, and said to the constable present, "I charge you to arrest him for felony." And, after verdict for the plaintiff, it was moved in arrest of judgment, that these words were not actionable; and adjudged by the Court for the defendant; and shewed a copy of the record.

Ante, 271.

JONES, *Justice*, said, he was Judge at that time in this court, and doth not remember any such case; but if it were adjudged, it was because the words be not laid to be spoken of the plaintiff. And as this case is, he conceived clearly that the action lies; for it is a malicious scandal when he chargeth him with felony; and in his own shewing doth not say what felony was committed.

1. Roll. Ab. 4.

BERKLEY, *Justice*, and MYSELF (RICHARDSON, *Chief Justice*; being absent) were of this opinion. Whereupon rule was given that judgment should be entered for the defendant, unless, &c.

(a) Poph. 201. Latch. 175. Bendl. 202.

### Lawrance against Woodward.

CASE 16.

ACTION FOR WOKDS; because he said *falsò et malitiosè* of the plaintiff, "Thou didst violently, upon the highway, take my purse from me, and four shillings twopence in it, and didst threaten me to cut me off in the midst; but I was forced to run away to save my life;" and that he accused him before *Mr. Chester*, justice of the peace.

To say that another "violently and by threats took a purse on the highway," imports a charge that he took it "feloniously and by robbery."

PRYNNE, after verdict, upon *not guilty*, moved in arrest of judgment, that an action lies not for these words; for he doth not say that he robbed him, nor that he feloniously took away his purse: and it may be taken in *mitiori sensu*, that he took it in jest, or in other manner, which was not felonious: also it is the more inforced, because it was put an accusation before a justice of peace; and for an accusation in form of justice an action lies not.

1. Roll. Ab. 66.  
Jones, 302.  
Yelv. 58. 145.  
Cro. Jac. 312.  
162.  
Ld Raym. 959.  
Bull. N. P. 5.

I doubted thereof, because it is not a direct charge of a felonious taking or robbery, by reason of the case of *Holland v. Stonner (a)*, where the defendant said, "Thou art a lewd fellow, thou didst set upon me by the highway, and didst take from me my purse and twenty marks in it, and I will be sworn to it." Being adjudged in the king's bench for the plaintiff, it was reversed in the exchequer chamber; for he doth not charge him with felony or robbing of him.

But RICHARDSON, *Chief Justice*, JONES, and BERKLEY, *Justices*, held, that the action lay; for "violently taking from him his purse, and threatening to kill him, and that he was in fear of his life," is a description that he took it from him feloniously and by robbery. Whereupon rule was given that judgment should be entered for the plaintiff.

Yelv. 58. 145.

(a) Cro. Jac. 315, 316.



## CASE 17.

Le Marchant *against* Rawson.*Ante*, Page 275.

If the sheriff return 23 on the *venire*, and 24 on the *hab. cor.* and the 24th, omitted in the *venire*, appear and is sworn, the error after verdict is amendable. *Ante*, 223.

Jones, 302.

**T**HIS Case was now moved again.—And ALL THE COURT, *seriatim*, delivered their opinion, that it is but a default in the clerk, and is amendable; for the record being good, and the clerk having it before him, it was merely a misprision of him: and the Justices of *nisi prius* having a good record and a good issue, and that tried, it is well enough; for they have sufficient by the record itself, by which it appears unto them what is the issue; and the writ of *distingas* with the *nisi prius* is a sufficient warrant for them to proceed. And ALL THE COURT conceived, it is directly within the 8. Hen. 6. c. 12. and amendable.

1. Roll. Ab. 202. Cro. Jac 158. 162 354. 647. Cro Eliz. 258. 1. Term Rep. 782.

The clerks in court cannot amend a record without permission of the Court.

(a) See Cases in Crown Law, 183, 184.

In the principal case the clerk, before and without direction of the Court, had amended it, which amendment was ordered to stand, and that the plaintiff should have his judgment: but because it was the default of the clerk of the treasury, to commit such a gross offence, he was fined forty pounds, and the clerk who made the amendment, without the Court's direction, was committed to prison (a). *Dyer*, 260. 2. Hen. 4. 6. 7. Edw. 4. 15. 2. Rich. 3. 11. 11. Hen. 6. 11.

## CASE 18.

Fines *against* Norton.

Trinity Term, 8. Car. 1. Roll 1386.

If one of the jurors who try a cause be not one of those returned in the *venire facias*, it is a mis-trial.

S. C. Jones, 300.

**E**RROR of a judgment in the common pleas in *assumpsit*. The defendant pleaded "*non assumpsit*;" which was found against him, to his damages of four hundred pounds, and judgment accordingly.

The error assigned was, Because upon the *venire facias* three-and-twenty jurors were returned, and in the *habeas corpora* there were four-and-twenty, viz. the three-and-twenty who were returned upon the *venire facias*, and one *Walter Lambert*, who was not therein returned; and being returned by *distingas*, twelve of them were sworn, whereof the said *Walter Lambert* was one; and the issue tried by them: whereupon judgment being given, this was assigned for error, and to be a mis-trial; for it is tried by one who was never returned by the sheriff upon the *venire facias*.

ALL THE COURT, who *seriatim* delivered their opinions, held this to be a manifest error, and not aided by any of the statutes of 32. Hen. 8. c. 30. 18 Eliz. c. 14. or 21. Jac. 1. c. 13.; for a juror misnamed is not a juror, who was never returned by the sheriff, so as he appearing is sworn without warrant, and is one added for the pleasure, and peradventure by the nomination of the plaintiff: this is *casus omissus* out of all the statutes, and not remedied by any of them, nor can it be aided by the examination of the sheriff. But if twelve of the twenty-three returned had been sworn, and not the said *Lambert*, it had been aided by the 18. Eliz. c. 14. as appears in *Tyrrel v. Gardiner* (a). Wherefore for this cause the judgment in the common pleas was reversed.

*Ante*, 223.

(a) 5. Co. 37. 5. Co. 42.

Young

## Young against Stoell.

CASE 19.

**A**CTION ON THE CASE, for disturbing the plaintiff to exercise THE OFFICE OF REGISTER in *Rocheſter*; and ſhews, that the office was an ancient office, and grantable as well in reverſion as in poſſeſſion; and that in the year 1622 this office was granted to him by the *Biſhop of Rocheſter*, HABENDUM *poſt mortem vel ſurſum redditionem* of J. S. who held it for life, *exercendum per ſe vel ſufficientem deputatum ſuum cum vadiis*, &c.

Upon not guilty pleaded, and trial at the bar, the plaintiff, upon the evidence to prove it was an ancient office and grantable in reverſion, ſhewed a grant of 4. *Edw.* 6. to one *Robiſon* in reverſion, after the death of *Buſhfield and Buſhfield*, and confirmed by the dean and chapter, which was *in eſſe*, the 1. *Eliz.* and that in 7. *Eliz.* he ſurrendered and took a new grant to him and J. S.

And it was held by ALL THE COURT, that this was a good inducement, that it was anciently ſo grantable in reverſion, but being matter of fact, was to be left to the jury: but they conceived, if it had not been uſually and anciently granted in reverſion, yet being granted before the ſtatute of 1. *Eliz.* c. 4. and being *in eſſe* at the time, and the eſtate confirmed by the dean and chapter, that it was a good grant.

SECONDLY, It was moved, that the reverſion of an office cannot be granted by a common perſon.—And it was agreed by THE COURT, that it cannot be granted as a reverſion, and by the name of a reverſion; for there is no reverſion of an office unleſs it be an office of inheritance, yet it may well be granted in reverſion, *habendum* after the death of the grantee for life.

is good.—Dyer, 259. a. Jones, 311. 1. Sid. 81. 10. Co. 61. 11. Co. 4. a. 3. Bac. Abr. 735, 736.

THIRDLY, It was moved, that this grant in reverſion to *Young* is void, becauſe he was a perſon unable at the time of the grant to exerciſe it, for he was an infant of the age of eleven years and no more: and although it be granted to him, HABENDUM *et exercendum per ſe vel ſufficientem deputatum ſuum*, yet it is not good; for an infant cannot make a deputy: and although at the time when the tenant for life of the office died, he was of the age of thirty years, yet being void at the time of the grant, it cannot be made good by any ſubſequent act.

But JONES, BERKLEY, and MYSELF (RICHARDSON being abſent) held, that the grant was good, notwithstanding that exception; for the grant is not void becauſe at that time he was an infant, or becauſe an infant cannot make a deputy: for an infant who can write and underſtand the *Latin* tongue may be a register, and may have ſufficient knowledge to write and register acts, which is ſufficient for his place, at leaſtwiſe he may have ſufficient knowledge to make an able deputy; and if he put in one who is inſufficient, it is cauſe of forfeiture of the office; but as this caſe is, it was granted to him in reverſion after the death of the then register, and he being able to exerciſe it at ſuch time as the office fell, it is ſufficient.

T 2

FOURTHLY,

Grant.

Ante. 49.

FOURTHLY, It was objected, that the office was usually granted with a fee of a robe, or thirteen shillings fourpence; and here the office is granted with the fee of the robe, and not in the disjunctive, or thirteen shillings fourpence—*Sed non allacatur*: for it being after the grant in the HABENDUM shall not make the grant to be void; and it is only void *quoad* the fee.

THE COURT said to the jury and counsel, that if they will, they may find the matter specially; but no special verdict was given, but a general verdict for the plaintiff.

CASE 22.

## The Case of the Forest of Dean.

Easter Term, 8. Car. 1. Roll .

If the lord inclose and approve the waste land, and the fences are thrown down in the night, an original writ shall issue to enquire who the malefactors are; and if the sheriff return that it was by persons unknown, a *distringas* shall issue against the inhabitants of the adjacent towns, to enquire and make good the damage.

Post. 439. 580.  
Jones, 306.  
2. Inst. 86.  
473. 476.  
Skuiper, 93.  
Dyer, 47. 316.  
339.  
4. Co. 38.  
11. Co. 74.  
1. Roll 365.  
Lut. 144. 157.  
170. 176.  
Raym. 487.  
Show. 103.  
1. Sid. 107.  
1. Lev. 103.  
1. Mod. 66.  
2. Com. Dig.  
4. 1.  
1 Hawk. P. C. 191.  
2. Term Rep. 371.  
3. Term Rep. 445.

A WRIT issued out of the chancery, bearing date 13. March, 7. Car. 1. to the sheriff of Gloucester, commanding him per *sacramenta proborum et legalium hominum de comitat. prædict.* to enquire, qui malefactores et pacis regis perturbatores apud forellam de DEANE, sepes et fossata JOHAN. GIBBONS ibid. per ipsum nuper levat, NOCTANTER, aut tali tempore, quo factum eorum sciri non credebant, prosternaverunt, to the damages of the said JOHN, et contra pacem. Et si prædictus JOHAN. fecerit te securum de clamore suo prosequendo, tunc pone per vadios et salvos plegios, omnes illos quos culpabiles ibidem inveneris, quod sint coram nobis in Quindena Paschæ ubicunque, &c. ad respondendum nobis de pace fractâ quam prædicto JOHANNI de transgressione, &c.

The sheriff at Quindena Paschæ returned the inquisition, quid virtute brevis prædict. ad inquirendum. (reciting the writ) per sacramentum duodecim, &c. qui dicunt super sacramentum suum, quod quidem malefactores et pacis regis perturbatores vi et armis sepes, viz. 769 partiarum sepium et fossarum ipsius JOH. GIBBONS apud forellam de DEANE, nuper ante per ipsum levat, prosternaverunt; sed qui aliquam partem inde prosternaverunt juratores prædicti ignorant. Et similiter dicunt quod vi armata, et cum multitudine gentium, malefactores et pacis perturbatores prædicti fuerunt; ita quod nullus ad ipsos appropinquare ad ipsos cognoscend. ausus fuit, et tali tempore quo factum eorum sciri non credebant, sepes et fossata prædicta prostraverunt et redierunt.

Hereupon a writ of *distringas* issued reciting the first writ, and the inquisition thereupon returned, and commanding the sheriff of Gloucester, "quod distringat propinquas villatas sepiibus et fossatis prædictis circum adjacent. prædictas sepes et fossata prostrata levare ad custodes suos proprias. And by the same writ it was commanded to enquire quædam prædictus JOHAN. GIBBONS occasione prostrationis prædictæ 769 partiarum sepium et fossarum sustinuit, et damna illa eid. JOHAN. GIBBONS restituere, and to return the writ and inquisition i. 1. Oñob. Trin.

The sheriff hereupon certified, quod villa de BRETELIS, et viginti aliæ villæ (naming them) in the county of Gloucester, sunt propinqua villata sepiibus et fossatis infra mentionatis circumadjacentes; and further certified, quod damnum in quâdam inquisitione brevi annexat. eid. JOHAN. GIBBON, propter brevitatem temporis restituere non potest; and returned issues upon every of the said villages, and that the residue of the execution of the writ appeared in quâdam inquisitione eidem brevi annexat.



annexat. and returned the inquisition, whereby was found, that the said JOHN GIBBONS *sustinuit dampnum occasione præmissorum ad 200l.*

The CASE of the FOREST of DEAN.

BRAMPSTON, *Serjeant*, upon his return, took divers exceptions:

FIRST, For the forest of Dean; there is not any parish named wherein it lies.—*Sed non allocatur*: for a forest is certain enough by itself.

A venue to a forest need not state in what parish it lies.

SECONDLY, Because this writ is founded upon the statute of Westminster the Second, c. 46. that if THE LORD hath right to improve any his waste, &c. and his hedges be destroyed *noctanter*, and it cannot be known by the verdict of the assise or jury who those malefactors were, the towns near adjoining shall be distrained to levy the hedge or dyke at their own costs, and to yield damages: and he doth not shew here that he is THE LORD of the said waste, and hath right to improve it.—But NOY, *the King's Attorney*, who devised this writ, said, that it sufficeth in a writ to shew the grief *breviter*; and if he be not any such person as may inclose, it ought to be shewn on the other side.

A writ of noctanter need not shew that the party injured was lord of the soil; for it is sufficient to state the grievance *breviter*. Post. 441.

THIRDLY, It was objected, that this inclosure is not shewn to be with the king's licence, and then it is without warrant: but thereto was answered, that it ought to come in by plea, after appearance, and not by way of exception.

The fact of "approvement" without licence cannot be moved

against proceeding in a *noctanter*, but must be pleaded. 2. Com. Dig. 431.

NOY, *the King's Attorney*, also moved, that they had no day in court, because the writ and the inquisition were returned the last Term, and they then not appearing and pleading, they shall not be received to come in by way of exceptions in this manner. And he shewed a record in *Trinity Term*, 15. *Edw. 1. Roll 3.* where such a writ was awarded for one *Nicholas de Stapleton*, whose hedges were cast down *noctanter*, and not being known by whom, he had a writ to distrain *propinquas villas* to repair; and he said, that was the precedent for this case: and he prayed a new *distringas* might be awarded. *Et habuit (a).*

If the inhabitants do not appear and plead on the return of the *distringas*, on a writ of *noctanter*, they cannot take exception to the return. Post. 440.

1. Sid. 107.

Lut. 157. 2. Com. Dig. 432.

(a) See 29. Geo. 2. c. 36. and 31 Geo. 2. c. 31. for the modern mode of inclosing commons for planting; and the punishment of those who prostrate the inclosure.

### Johns against Staynar.

CASE 21.

Vide Ante, 272.

THIS Case was now moved again by ROLLE, for the defendant in the writ of error: and he vouched the case of *Calthorp v. Guiseper (a)*, where trespass of assault and battery was brought and tried in *Middlesex*, and the bill upon the file was in *London*, it was resolved, that it was a declaration and trial without bill, which is aided by the statute; wherefore it was there adjudged for the plaintiff. And another precedent, *Kelley v. Reynell (b)*, where debt was brought in *Exeter*, and the writ supposed to be within the county of *Devon*, after verdict it was held, that the writ in one county cannot be intended for an action in another county, and therefore it was a trial without an original.—But ALL THE COURT here

In ejectment, if the *ouster* be alleged after the test of the original, judgment is erroneous. Ante, 90. 272. Post. 327. S. C. Jones, 304. Cro. Jac. 479. Cro. Eliz. 722. 1. Com. Dig. 105.

1. Bac. Ab. 92. 97, 28.

(a) Cro. Jac. 655.

(b) Cro. Jac. 674.

held,

JONES  
against  
STATNAR.

held, that this judgment was erroneous, because this original is certified as an original in this action, which is betwixt the same parties of the same land and of the same term, and being taken out before the cause of action, it is a vitious and an ill original, not aided by any statute; and compared it to *Bishop's Case* (a): whereupon they all agreed, that the judgment was erroneous; and therefore it was reversed.

(a) 5 Co. 37.

CASE 22.

John George and his Wife against Harvy.

To say, "You  
are a witch,  
and a strong  
witch," is  
actionable.  
See post. 324.

**ACTION ON THE CASE;** for that the plaintiff having communication at *Bury* with the defendant of his the said plaintiff's wife, the defendant said, "She," *innuendo* the plaintiff's wife, "is a witch, and a strong witch."

WHITFIELD moved in arrest of judgment, that these words are not actionable, unless he had said, she committed witchcraft in bewitching some person or his goods, so as she should be punishable by the 1. Jac. 1. c. 12. (a); for the word "witch" generally is but a word of scolding, and most commonly used of bewitching one with his words or countenance; and he said, it was so adjudged in *Hawkes v. Auge* (b).

But it was alledged on the other side by GRIMSTON, that in *Hughs v. Farrer* (c), for calling one "witch, and that she had bewitched his "drink," it was adjudged that the action well lies.

But because it was said, there were precedents both ways, the Court would advise (d).

(a) Repealed by 9. Geo. 2. c. 5. See 1. Hawk. ch. 4. s. 5.

(b) Cro. Jac. 531.

(c) Ante, 141.

(d) It was moved again in Michaelmas Term, and adjudged for the defendant. Post. 324.

Jones, 325.  
Ante, 141.  
Post. 320.  
1. Com. Dig.  
192.

CASE 23.

Collis against Malin.

Trinity Term, 8. Car. 1. Roll

A declaration for scandalous words against a trader must aver that he was a trader at the time the words were spoken.

1. Jones, 304.  
Cro. Eliz. 273.  
Cro. Jac. 222.  
Yelv. 21. 159.

**ACTION FOR WORDS.** Whereas the plaintiff had used *per magnum tempus* the trade of buying and selling of cattle, and divers times bought upon his credit; that the defendant said of him, "*Thou art a bankrupt!*" The defendant pleaded not guilty; and found against him.—And because he did not say, that he used the trade at the time of speaking the words, but *per magnum tempus usus fuit*, which may be divers years before, and the action lies not, unless at the time of speaking the words he used the trade of buying and selling of cattle, therefore it was adjudged for the defendant.

1. Com. Dig. 195. Salk. 694. Stra. 696 1169. 1. d Ray. 1417. 2. Burr. 1688.

CASE 24.

Parker against Grigson.

Trinity Term, 8. Car. 1. Roll 130. or 1306.

The want of a bill on the file in ejectment is aided, after verdict, by 18. Eliz. c. 14.

Jones, 304.  
Hob. 130.  
1. Com. Dig.  
320  
2 Ter. Rep. 657.

**EJECTMENT.** After verdict, it was moved by GRIMSTON in stay of judgment, that there was not any bill upon the file; and it was prayed, that the Court would order that none might be filed.—But THE COURT held it to be aided by the equity of the 18. Eliz. c. 14.; and in *Woodhouse v. Willis* (a) it was so resolved in a writ of error. Wherefore judgment was given for the plaintiff, notwithstanding this exception.

(a) Trinity Term, 16. Jac. 1. Roll. 945.

## Stirley against Hill.

CASE 25.

**A**CTION FOR WORDS; for that he said to the brother of the plaintiff, "Thy brother was whipped about *Taunton Cross* for stealing of sheep, or burned in the hand or the shoulder." After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that these words do not import any certain slander.—And of that opinion was **ALL THE COURT**. Wherefore it was adjudged for the defendant.

Words not im-  
porting certain  
slander are not  
actionable.  
Jones, 308.

## Gryfill against Whichcott.

CASE 26.

Trinity Term, 8. Car. 1. Roll 420.

**D**EMURRER in ejectment. The question was, If one mortgage land for one hundred pounds, and take bond for the interest of eight pounds *per annum*, payable half-yearly, whether that makes the bargain usurious against the statute (a)?

Because, as it was pretended, the use ought not to be paid until the end of the year, and contracting to have half of it yearly, is not warrantable by the statute.

But **THE COURT**, upon the first argument at the bar, over-ruled it, that it is not any usurious contract contrary to the statute, because the hundred pounds is let for a year; and the reservation is not of more, but of what is permitted by the statutes: and although the interest is reserved payable half-yearly, it is allowable, for he doth not receive any interest for more or less time than his money is forborn; wherefore, without difficulty, it was adjudged for the plaintiff.—And error being brought in the exchequer chamber, and the error assigned in point of law, the judgment was affirmed.

It is not usury  
to take a bond  
for the payment  
of the legal in-  
terest of a sum  
of money on  
mortgage, al-  
though made  
payable half-  
yearly.

Ante, 17.  
Post. 301.  
Moor, 644.  
Cro. Jac. 26.  
677.  
Yelv. 30.  
Jones, 396.  
1. Bullst. 17.  
2. Vent. 83.  
2. Mod. 307.  
Doug. 235.

1. Hawk. P. C. 529. 5. Bac. Abr. 408. Cowp. 112.

(a) 21. Jac. 1. c. 17.; but by 12. Ann. c. 16. interest is reduced to 5 per cent.

## Burgaine against Spurling.

CASE 27.

Vide Ante, page 273. No. 10.

**T**HIS Case was now argued again: and it was strongly urged for the plaintiff, that by the first surrender all the estate of the copyhold until the condition performed is out of the surrendor, so as he hath not any interest left in him to make another surrender, although he afterwards should perform the condition; for he cannot make the second surrender, which was void, to be good: but when the condition is performed, the estate is re-vested in him; and then he might well make the third surrender.

But it was thereto answered, and **RESOLVED BY THE COURT**, that the second surrender is not hindered by the first, for nothing passed thereby until it was presented in court, and admittance thereupon; but the interest and right of the copyhold and the possession remained with him who made the surrender, so as he may transfer it to any other, and it shall be good, if the first surrender doth not take effect; for the surrender into the hands of the tenants was but an inchoation of his estate to whose use the surrender was made, and

If a copyholder  
surrender to A.  
and afterwards  
surrender to B.  
who is admit-  
ted, and then  
the surrender to  
A. is presented  
at the next  
court, and he is  
admitted, he  
shall avoid the  
admission of B.  
Post. 569.  
S. C. Jones, 305.  
1. Roll. Ab. 473.  
500.  
Co. Lit. 62.  
Cro. Eliz. 349.  
Cro. Jac. 403.

Pollexf. 50. 1. Term Rep. 600. 2. Term Rep. 484  
such



BURGAINÉ  
agdnst  
SPURLING.

Ante, 218.  
Cro. Jac. 53.  
Hob. 165.  
1. Roll. Ab. 500.  
Co. Lit. 210. a.  
314. b.

such an inchoation as had no perfection, but became merely void, and the second surrender good: as a bargain and sale to one, and after a bargain and sale to another, the first is not inrolled, but only the second, the second is good: so a grant of a reversion to one, and before attornment a grant thereof to another, and to the second grantee attornment is made, the second grant is good, *et nihil operatur* by the first: so where a fine is acknowledged to one, upon a *dedimus potestatem*, and afterward a second is acknowledged, and the first fine not recorded, the second fine is good; but if the first fine had been recorded in court in time convenient, *viz.* the next Term, it had been good, and the second had been merely void: so this first surrender, when it was not presented at the next court, is as if none had been made, and merely void *ab initio*; and therefore the second surrender good.

Payment before  
the day is a  
good performance  
of a condition to pay at  
the day.

SECONDLY, ALL THE COURT AGREED, that whereas in the principal case the condition was for the payment of 1060l. upon the first of July, and the payment was made before the first of July, *viz.* upon *decimo sexto Junii*, and an acceptance thereof, it is a good performance of the condition.

Pl Com. 291. a. Co. Lit. 212. Cro Jac 435. Moor, 47. Cro. Eliz. 142. Dougl. 49. 2. Term Rep. 388. 3. Term Rep. 374. See 4. Ann. c. 16. f. 12.

After surrender,  
the estate re-  
mains in the  
surrenderer un-  
til admittance.

NOTE, That the first surrender is merely void, and as if it never had been made; and that after the surrender, he who surrendered remained always copyholder, so as it should descend to his heir, and he might dispose thereof: but if the first surrender had been presented at the next court, that would have so bound the land, as all mesne acts done or made afterwards would have been void.—Judgment for the plaintiff.

Cro. Eliz. 349.  
Cro. Jac. 403.  
3. Bull. 218.  
1. Roll. Ab. 502.

3. Lev. 385. 1. Vent. 261. 1. Term Rep. 393 600. 2. Term Rep. 198.

#### CASE 28.

#### Delves against Clerk.

A promise to  
assure land is  
local, and must  
be tried where  
the land lies.  
Post. 295.  
Cowp. 176.  
181.  
2. Term Rep.  
241.

**A**SSUMPSIT. Whereas the defendant was seised of such lands in *Chislehurst*, in the county of *Kent*, 21. May 1631, in fee, and was in communication with the plaintiff to sell the same for such a sum; that the defendant, *adtunc et ibidem, viz. prædicto 21. May 1631, apud London. prædict. in parochiâ Beatæ Mariæ, &c.* in consideration of such a sum, promised to assure, &c.—Upon *non assumpsit*, the trial was in *London*, and exception taken in arrest of judgment, that it was a mis-trial, and not aided by any of the statutes; for it ought to have been tried in *Kent*, where the land lies, and where, by the *adtunc et ibidem*, the promise is, and the *venue* cannot be altered.—ALL THE COURT was of this opinion, that the *videlicet* is idle, and may not alter it. Whereupon a *venire facias de novo* was awarded.

## Cucko against Starre.

CASE 29.

**P**ROHIBITION was prayed to the spiritual court to stay a suit there for defamation for these words: "Thou art a drunkard," or "a drunken fellow."

And by the opinion of JONES, BERKELEY, and MYSELF, a prohibition was granted: for these words do not concern any spiritual matter, but are merely temporal: and they are but *convitium temporale*; and a common phrase of brawling, for which there ought not to be suit in the spiritual court; and so it was held in *Martyn Calthorp's Case*, in the common pleas.

But RICHARDSON doubted thereof, because the spiritual court as well as the temporal may meddle with the punishment of drunkenness; so it is not merely temporal: but he assented to the grant of a prohibition, and the party may, after declaration, if he will, demur there- to. Whereupon a prohibition was granted.

Prohibition granted to stay a suit for calling a man a drunkard. Ante, 111. 229. Post. 309. S.C. Jones, 305. 2. Roll. Ab. 296. 1. Hawk. P. C. 13. 2. Bac. Ab. 38. Cowp. 424. 1. Term Rep. 552. 2. Term Rep. 437.

## Major against Talbot.

CASE 30.

Easter Term, 8. Car. 1. Roll 419.

**C**OVENANT. Whereas one *Selbie* and *Elizabeth* his wife were seised of such an house and land, to them and the heirs of the husband, and so seised, by indenture let that house and land to the defendant, wherein he covenants with them, and either of them, and with the heirs and assigns of the husband, for doing all reparations; the husband and wife conveyed that reversion to the plaintiff in fee, who brings a covenant for not repairing of the said house, declaring upon all this matter, and concluding, *quod actio ei accrevit*, as assignee to the husband, and avers not the wife to be dead.

The defendant demurs; which was argued by *ROLLE*, for the plaintiff, and by *MERFIELD*, for the defendant; and by him much insisted, that the plaintiff having his estate, as well from the wife who had an estate for life, as from him who had the fee, ought to have brought covenant as assignee to both, and not as assignee to him who had the inheritance, unless the wife's death had been alledged; and for that purpose he cited *Trepart's Case*, 6. Co. 15. and *Dyer*, 234. 6.

But ALL THE COURT held, that the action is well brought, being brought by the assignee of him who hath the inheritance, and so no prejudice to any, and the estate for life, being transferred with the fee, is thereby drowned and confounded; so as he being assignee of the whole estate, and shewing all the matter, it is good enough.— Wherefore it was adjudged for the plaintiff.

On an assignment of land by husband and wife, where they are seised to them and the heirs of the husband, it is sufficient to declare as assignee of the husband. Jones, 305. Cro. Jac. 240. Cro. Eliz. 823. Carth. 519. Ld. Ray. 224. 1. Peere Will. 378. Stra. 229. 726. 1. Bac. Ab. 306. Dougl. 329. 452.

## Kercheval against Smith and Others.

CASE 31.

**A**CTION on the case against them, Because they being churchwardens of ———, presented the plaintiff *falso et malitiose* upon a pretended fame of incontinency. Upon not guilty, it was found for the defendants; and moved, that they might have double costs, churchwardens, &c. do not extend to matters of ecclesiastical cognizance. Ante, 175. S. C. Jones, 305.

The statutes 7. Jac. 1. c. 5. and 21. Jac. 1. c. 12. giving double costs to

because

KERCHEVALL  
against  
SMITH and  
OTHERS.

2. Hawk. P. C.  
61.

because they were troubled and vexed for matter which did concern their office.—But IT WAS RESOLVED, it was not within the statute, for it is merely ecclesiastical; and the makers of the statute never intended to give double costs, but where men are vexed concerning temporal matters, which they shall do by virtue of their office, and not for presentments concerning matters of fame.

CASE 32.

Nevill against South and Delabarre.

In the Exchequer Chamber.

Error does not  
lie to the exche-  
quer chamber  
by 27. Eliz. c.  
8. on a judg-  
ment in *scire*  
*facias*.

Ante, 142.  
Post. 300. 464.

1. Roll. Ab. 929.

Roll. Rep. 264.

Vent. 38.

Salk. 263.

Cro. Jac. 171.

Ld. Raym. 97.

12. Mod. 105.

Comb. 393.

2. Bac. Abr. 212. *Sed vide* Wright v. Nutt, 1. Term Rep. 388 2. Term Rep. 46.

**E**RROR brought in the exchequer chamber of a judgment in a *scire facias* by an executor, to have execution of a debt recovered by the testator. And it was now moved, that the record was not well removed, for no writ of error lies there upon a judgment in a *scire facias*; for the statute 27. Eliz. c. 8. gives it only in seven several cases, viz. in suits of actions of debt, detinue, covenant, account, actions upon the case, *ejectione firmæ*, or trespass; so a *scire facias* is not mentioned: and it hath been adjudged, that error lies not there of a judgment in a *scire facias* against bail, nor in a writ *de scandalis magnatum*.—But THE COURT doubted whether this *scire facias*, being grounded upon a judgment in an action of debt, be not within the equity of the statute; therefore they would further advise.

CASE 33.

Hitchman against Porter.

Trinity Term, 8. Car. 1. Roll 483.

In an action for  
a malicious pro-  
secution, it is  
sufficient for the  
plaintiff to say  
that he was *le-  
gitimo modo ac-  
quietatus*, with-  
out adding *inde*.

Cro. Jac. 230.

Strange, 114.

1. Com. Dig.

161.

Dougl. 215.

2. Term Rep.

225. 231.

4. Term Rep.

247.

**E**RROR of a judgment in the common pleas. The error assigned was, Whereas an action upon the case was brought in nature of a conspiracy; that the defendant *falso et malitiosè* imposed upon him *crimen talis felonie*, and caused him to be arrested thereupon, and bound over to the assizes, and exhibited a bill of indictment against him for that supposed felony, and caused him to be indicted and detained in prison until he was *legitimo modo acquietatus*; and he doth not say "*inde*," which was a principal word, and the principal cause of damages: and it was said, that in *Stiles v. Pricket*, for this point judgment was reversed: and that in this Term, for this default in the like action, betwixt the same parties, judgment was given, "*quòd querens nihil caperet per breve*;" and this judgment here in question passed *sub silentio*.—*Sed adjournatur* (a).

(a) It was moved again, and adjudged for the plaintiff. Post. 315. 420.

CASE 34.

Lyster against Bromley.

Trinity Term, 8. Car. 1. Roll 235.

A sheriff may  
take 12d. in the  
pound for the  
first 100l. and  
6d. per pound  
for every pound  
above the 100l.;  
and this extends  
but he cannot

**E**RROR of a judgment in the common pleas, viz. DEBT by the under-sheriff for his fees, where he demanded 12l. 10s. for executing of a *capias ad satisfaciendum* of 400l.

The error assigned was, Because he demanded more for his fees than the 29. Eliz. c. 4. (a) allows (b), viz. whereas he ought to take a bond for his fees.

(a) This statute appears by the parliament Rolls to have been passed in the 28th year of Eliz. *Vide* 1. Salk. 331.

(b) For subsequent statutes which make allowance to sheriffs, see 3. Geo. 1. c. 15. 8. Geo. 1. c. 5. 7. Geo. 3. c. 29. 14. Geo. 3. c. 20.

have



have but sixpence for every pound where the execution is above 100l. and twelpence for every pound where the execution is but 100l. or under; he taking 5l. for the first 100l. and 50s. for every of the other hundred pounds, had taken more than sixpence in the pound for the said execution of 400l.: and for this cause the error was assigned.

But a precedent was shewn in *Hilary Term*, 1. Car. 1. Roll 721. *Jesson v. Wesley*, in this court, where it is adjudged, that a sheriff ought to have for his fees 5l. for the first 100l. and 50s. for every other 100l. over and above the first hundred pounds; otherwise, if the execution should be for 120l. or 160l. he should have less than for the execution of 100l. which never was the intent of the law; for the law gives allowance to the sheriff for executing process, which by construction shall be most favourably taken, and according to the intent of the law-makers, and not that he shall have less for the execution of 140l. than for the execution of one hundred pounds. Another precedent was shewn in *Easter Term*, 14. Jac. 1. Roll 537. where was the like judgment.

ALL THE COURT, *absente* RICHARDSON, were of this opinion; but we would advise.—The next day RICHARDSON, *Chief Justice*, being in court, it was moved again, and the record betwixt *Jesson, Sheriff of Coventry, v. Wesley* was produced, wherein he declares in debt for his fees 12l. 10s. for taking execution of a judgment of 400l. And upon this declaration it was demurred, and two questions then made: First, Whether the sheriff may demand twelpence in the pound for the first 100l. and sixpence after for every 100l. or that he ought to have but sixpence in the pound where the sum exceeds 100l.? And it was adjudged that he shall have twelpence for every pound of the first 100l. and sixpence for every other pound over the 100l. Secondly, although it be provided in the 29. Eliz. c. 4. that this shall not extend to sheriffs of cities or corporations, it was held, that it was only to be intended for the executing judgments in the courts of the said corporations (a), and not to the sheriffs of cities or corporations, for the executing judgments out of superior courts. Another precedent was shewn in *Easter Term*, 4. Jac. 1. Roll 551. *Proby v. Michell* (b), in an action of debt for fees, and adjudged accordingly. And whereas GRIMSTON cited a case in the common pleas, in *Michaelmas Term*, 17. Jac. 1. of *Sympton v. Bathurst*, where the opinion was, that the sheriff ought to have but sixpence in the pound where it is above 100l. and that the judgment was there entered for the defendant—JONES, *Justice*, said, the reason of that judgment was not for the cause now alledged, but for that the sheriff had taken a bond for his fees, and had brought an action of debt upon that bond; and the defendant had pleaded the 23. Hen. 6. c. . in avoidance thereof. The Court there conceived, although he might have such fees as were allowed by the statute, yet he might not take bond for them; for under colour thereof he might so have double fees, &c.—Wherefore here, after argument, judgment was affirmed (c).

LYSTER  
against  
BROMLEY.

Jones, 307.  
1. Roll. Ab. 738.  
Cro. Jac. 103.  
Cro. Eliz. 264.  
335.  
Latch. 5. 17.  
21. 187.  
Poph. 173.  
Bendl. 191.  
Noy, 28. 75. 90.  
Moor, 853.  
Ante, 150.  
Winch. 20. 50.  
2. Black. Rep.  
832. 1103.  
Salk. 441.  
5. Com. Dig.  
598.  
3. Willf. 309.  
316.  
Doug. 40.  
2. Term Rep.  
B. R. 148

(a) Vide 3. Geo. 1. 15.

(b) Moor, 835. 1. Roll. Rep. 404.

(c) On *ca. fa. feire facias*, or *elegit*, the sheriff shall have fees on the whole debt.

Salk. 331. 209. 333. Skin. 363. 5. Mod. 97. and on an extent, 2. Jones, 185. Parker, 177. Burr. 1981.

## CASE 55.

## Drake against Corderoy.

Michaelmas Term, 7. Car. 1. Roll 280. or 28.

In an action for these words, "You are forsworn," the omission of stating in what court the oath was taken is aided by a justification that the false oath was taken at sessions.

Ante, 209.

Post. 385. 366.

S. C. Jones, 307.

S. C. 1. Roll.

Ab. 41.

8. Co. 100.

Gr. Eliz. 594.

Hob. 82.

1. Roll Rep. 66.

Gr. Jac. 125.

370. 668.

Lutw. 253.

632. 1492.

3. Lev. 393.

Fortesc. 377.

**E**RROR of a judgment in the common pleas in an action for words. Whereas the plaintiff was constable of *D.* and sworn before the justices of peace in the county of *Wilts.* at their quarter sessions, concerning an affray made by the defendant upon one *Fisher*; that the defendant, *ad tunc et ibidem* in the said court, in the presence of the justices, said, "He (*innuendo* the plaintiff) is forsworn," without any mentioning of the said oath. The defendant justifies, shewing the oath which he made in the open sessions, and that it was false. Upon which justification the plaintiff takes issue, which was found; and judgment given for the plaintiff.

The error was assigned, that the words are not actionable, because he doth not say in the declaration that he was forsworn by his oath taken in any court; and to say generally that the plaintiff is forsworn, an action lies not; but to say he is perjured, an action lies. And here it is not shewn that he was forsworn by reason of his oath taken at the sessions; wherefore the declaration is not good, nor is it aided by the plea.

But ALL THE COURT held, that if there were any doubt, it was upon the declaration, which was uncertain, because he doth not shew that the words intended a false oath in a court of record; yet when the defendant by his plea confesseth he spake those words by reason of his oath taken at the sessions, that clears the question whereof he intended to speak. Wherefore the judgment was affirmed.

## CASE 36.

## Bland against Inman.

Hilary Term, 7. Car. 1. Roll 550.

A termor and his wife on the one part assign all the term "reddendo et solvendo" to him and his wife "durante termino predicto," and to the survivor of them, if they shall live so long, with a proviso to re-enter on non-payment of the rent to him, or his wife, or the survivor, or their assigns, or the assigns of the survivor—This reservation shall continue only during "the life of the husband and wife," and not as to her is

**T**RESPASS. Upon a special verdict the case was, *Thomas Spence*, possessed of a lease for a hundred years, by indenture betwixt him and *Joan* his wife of the one part, and *Tisdale* on the other part, which is found to be sealed and delivered only by *Spence*, and not by his wife, assigns all their estate in the lease to *Tisdale*, reddendo et solvendo to him and *Joan* his wife, durante termino predicto, to them and the survivor of them, if they shall live so long, 7l. at Michaelmas and the Annunciation, with a PROVISIO, "That if the said rent be behind at any of the said Feasts, or forty days after, and not paid to him or his wife, or the survivor of them, that then it shall be lawful to the said *Spence* and his wife, and to the survivor of them, and to their assigns, and to the assigns of the survivor of them, to re-enter and have again, as in their former estate." *Tisdale* enters, and *Spence* dies, and *Joan* survives him, and for forty days after the Annunciation next following, the rent being behind and not paid, the wife the last day demands it; and one *Walter*, the administrator of *Spence*, demands also the rent which is not paid. *Tisdale* assigns his estate to the plaintiff, and *Walter*, as administrator of *Spence*, enters for non-payment, and lets to the defendant; and if, &c. This case was oftentimes argued at the bar and after at the bench.

not during "the term;" and if the wife has omitted to execute the deed, the reservation is void, and will continue no longer than the life of the husband.

THE FIRST QUESTION was, Whether this reservation be good to the wife, because she had not any interest to pass, and never sealed the deed?—and, if it be not good to the wife, because she is a stranger to the interest and to the deed, Whether it be not good to the husband, and to his executors and administrators as assigns in law, during the time of the wife's life?—and, Whether the administrator, for the benefit of the wife, shall not enter into the land?

GRIMSTON, *on the part of the defendant*, urged, that the words being "*reddendo et solvendo*" to the husband and wife *durante toto termino*, and to the survivor of them, it being by indenture, is good, by way of reservation to the husband; and the word *solvendo* shall be construed as by way of grant to the wife: for although she did not seal, yet she being named in the deed, and the party grantee sealing and delivering it to the husband and wife, it shall be construed by way of grant to her; and she may take by the deed, being named therein, although she never sealed any part thereof.

BERKLEY, *Justice*, was of that opinion; and cited one *Constable's Case*, that where lessee for years assigned his term, rendering rent *durante termino* annually to him, that includes his executors and administrators, although they be not named: as in the case of *Littleton (a)*, condition to pay a sum to a feoffee such a day, and he dies before the day, it shall be paid to his executors, for they represent the testator.—To the second, BERKLEY conceived, If it be not good to the wife, neither by way of a reservation, as he agreed that could not be, because she is a stranger to the estate and to the deed; yet by way of grant, by the words "*reddendo et solvendo*," he conceived, the deed might take effect; yet he held, that the administrator is assignee, who may enter for the condition broken, for the wife's benefit.

But RICHARDSON, *Chief Justice*, JONES, and MYSELF agreed, that although the *reddendo et solvendo durante termino*, if there had been no more said, had been a reservation *during the term*; yet when he doth not rest upon the exposition of the law, but it is, "rendering to him and his wife, and the survivor of them, if they live so long," that is an express reservation that it shall not be during all the term, but to him and his wife and the survivor of them: and the reservation to his wife is void, because she is no party in interest or to the deed; and "to the survivor of them" is void also to give the wife any advantage thereby; and therefore the rent endures no longer than during the life of the husband. *Vide 10. Edw. 4. 18. 21. Hen. 7. 25. 8. Co. 70. b. in Whitlock's Case, Co. Lit. 47. c. & 143. b. and Hilary Term, 33. Eliz. Richmond v. Butcher*, where one lets reserving rent to him his executors and assigns, he having an inheritance in the land, it was adjudged a void reservation to the executor, the reversion being in the heir, yet the rent shall not be paid unto him because he is not named; although it were there *durante termino*, it was not material.—And JONES said, that so it was adjudged in *Brown v. Shurrey (b)*, 2. Car. 1.—Also THEY ALL HELD, that here this word "*solvendo*" cannot enure by way of grant to the wife, when it is by way of reservation to the husband, for it shall not be construed

BLAND  
against  
INMAN.

Godb. 448.  
2. Roll. Ab. 450.  
1. Jones, 303.  
12. Co. 36.  
Cro. Eliz. 217.  
832  
Owen, 9.  
Litch. 99. 255.  
264.  
2. Saund. 369.  
370.  
5. Co. 111.  
1. Vent. 148.  
161.  
Raym. 243.  
2. Lev. 13.

R. 613.

R. 157.

Dyer, 45. a.  
Co. Lit. 213. c.  
8. Co. 70.  
Plowd. 243.  
Co. Lit. 47. a.  
2. Saund. 367.  
Cro. Eliz. 217.

(a) Sect. 339.

(b) 2. Roll. Ab. 451.



BLAND  
against  
INMAN.

2. Co. 35. b.  
12. Co. 35.  
Latch. 274.  
1. Mod. 216.

to enure in several manners, no more than if one bargains, sells, demises, and grants, it shall not enure by bargain and sale and demise, but by the one of them, at the election of the bargainee: and in the reservation assignee is not mentioned; so that it cannot give any interest to the administrator *as assignee* in law: and in the proviso assignee is mentioned, but that is to the assignees of the survivor of them; so that the assignee in law of the husband cannot claim it, for he did not survive, but the wife. And the wife can take no advantage of the condition, because she is a stranger to the estate and to the deed, seeing she did not enfeal the deed; and if the condition should go to the wife, yet she cannot enter for the condition, but only the administrator of the husband, who hath not any title of entry; and the defendant claims by him. Wherefore it was adjudged for the plaintiff.— Upon this judgment a writ of error was forthwith brought, returnable in the exchequer chamber; and the judgment was there affirmed in *Michaelmas Term*, in the tenth year of *Charles* the first.

Hilary

## Hilary Term,

8. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.* } *Justices.*

Sir Robert Berkley, *Knt.*

William Noy, *Esq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

### Carlion against Mill.

*Hilary Term, 7. Car. 1. Roll 1147.*

CASE 1.

**A**CTION ON THE CASE; for that the defendant, being an apparitor under the bishop of Exeter, maliciously, and without colour or cause of suspicion of incontinency, of his own proper malice procured the plaintiff *ex officio* (a), upon pretence of fame of incontinency with one *Editba*, whereas there was no such fame or just cause of suspicion, to be cited to the consistory court of Exeter, and there to be at great charges and vexation, until he was cleared by sentence, which was to his great discredit and cause of great expences and losses. Upon not guilty pleaded, it was found for the plaintiff.

An action on the case lies against the apparitor of a bishop for maliciously causing a man to be cited to the consistory court upon a groundless suspicion of incontinency.

*Ante, 285.*

ASHLEY, *Serjeant*, moved in arrest of judgment, that in this case an action lies not; for he did nothing but as an informer, and by virtue of his office.

BUT ALL THE COURT, *absente* RICHARDSON, held, that the action well lies; for it is alledged, that he *falso et malitiosè* caused him to be cited, upon pretence of fame, where there was no offence committed: and avers, that there was not any such fame, so as he did it maliciously, and of his own head, and caused him to be unjustly vexed, which was to raise gain to himself: whereupon they conceived, he being found guilty for it, the action well lies; and therefore rule was given to enter judgment for the plaintiff, unless other cause was shewn.—And upon a second motion, RICHARDSON, *Chief Justice*, being present, judgment was given for the plaintiff.

S C Jones, 305. 312.  
1. Roll. Ab. 93. 102.  
Cro. Jac. 351. 356.  
Cro. Eliz. 714. Lutw. 67.  
1. Sid. 460. 463. 1. Lev. 92. 292. Skin 131.  
1. Com. Dig. 164.  
2. Mod. 52. 1. Vent. 86.  
1. Bac. Ab. 58.

Dougl. 629. 1. Term Rep. 493. 4. Term Rep. 247.

(a) See 13. Car. 2. c. 12.

### Hopestill Tyndal's Case.

*Ante, Page 264.*

CASE 2.

**N**OTE, That the first day of this Term *Hopestill Tyndal* was arraigned at the bar for buggery, supposed to be committed at *Hithbe*, being one of the *Cinque Ports*, he being indicted there, and the record removed hither by *certiorari* directed to "The Mayor and Jurats" of the said vill, and not to "The Lord Warden of the *Cinque Ports*."

*Acertiorari* from the king's bench to remove an indictment of felony from one of the *Cinque Ports*, must be directed to the

mayor and jurats, and not to the lord warden. See *ante*, 252. 264. 2. Hawk. P. C. Rep. 658.

400. 3. Term

The prisoner challenged one of the jurors, being the foreman, who was sworn, and marked sworn by the clerk, before the challenge was heard by the Court; and therefore without the assent of the

A challenge not heard till the juror was sworn and marked, Post. 347.

cannot be admitted without consent of the attorney general. See attorney

TYNDAL'S  
CASE.

attorney general, then present, they would not alter the record; and because he would not assent to alter the record, the challenge was disallowed.

(a) By 1. Ann.  
e. 9. witnesses  
in behalf of a  
prisoner shall  
not be sworn.  
2. Bulst. 147.  
2. Hawk. ch. 46. f. 29. and the cases there cited. 4. Bl. Com. 353.

And afterwards, upon evidence at the bar, divers witnesses were produced by the defendant, which were heard without oath (a); but some of them witnessing matter which the attorney general conceived would make for the king, were upon the desire of the said attorney sworn, and after ordered upon their said oath to deliver their knowledge.

Qu. If a prisoner acquitted of felony can be bound to his good behaviour.  
Cro. Jac. 507.  
2. St. Tr. 60  
2. Hawk. P. C. 613. 627.

The prisoner was afterward acquitted: but because the evidence (if it had been believed by the jury) was very strong against the prisoner, RICHARDSON, Chief Justice, and JONES appointed, that the prisoner should be bound to his good behaviour; whereupon, against the opinion of MYSELF and JUSTICE BERKLEY, he was so bound.

## CASE 3.

## Rose against Bartlett.

Trinity Term, 7. Car. 1. Roll 497.

If an administratrix marry, and the husband grant "all his goods and chattels," and expresses in the deed that he has given a horse in the name of seisin of the goods, which horse is parcel of the goods of the intestate; the goods of the intestate will pass by this grant.  
*Sed quare.*

21. Hen. 7. 29.  
2. Roll. Ab. 58.

**EJECTMENT** on the demise of *John Rose* and *Elizabeth* his wife of forty acres of land and two acres of meadow, in *Burnham*, for three years. Upon not guilty, a special verdict was found, that *Philip Scudamore* was seised in fee of the land in the declaration, 44. *Eliz.* and by indenture demised it, by the name of four closes of pasture in *Burnham*, for a hundred years to *Richard Batyne*; and that *Richard Batyne* entered and was possessed: and being so possessed, and seised in fee of other lands and tenements in *Burnham*, afterwards, viz. 12 April, 3. Car. 1. made his will in writing, which is found in *hæc verba*: "I will, that my wife *Elizabeth* shall have *Burnhams* and the lands thereunto belonging, being three half acres in *Lentfield*: and my will is, if she do marry, my son *Nicholas* shall have *Barnhams*, and three half acres lying in *Lentfield*. ITEM, I will, my son *Bartholomew* shall have for his maintenance out of the lands five pounds yearly so long as she keepeth herself unmarried. ITEM, I will and bequeath to my said wife *Elizabeth* all the rest of my lands lying in the parishes of *Burnham* and *Hitchman* during the time of her life, and afterwards to my son *Bartholomew*. ALSO, I make my wife my full and whole executrix of all my cattle, corn, and moveable goods, except such as I have appointed to be sold for payment of legacies," *prout per le volunt, &c.*—They find that *Richard Batyne* died, and the said *Elizabeth* proved the will in the prerogative court, *quodque administratio omnium bonorum jurium ac creditorum dictam RICHARDUM BATYNE et ejus testamentum qualitercunque concernent.* by the judge of the prerogative court was committed to the said *Elizabeth*: that she afterward took to husband the defendant, whereby they were possessed of the said lease; and that the said *Bartlett* assigned that lease to *Richard Hammond* upon the condition for the payment of thirty pounds at a day certain, who, failing of the payment thereof, re-assigned afterwards that lease to the defendant: that the said *Elizabeth* died; and afterwards the said *Bartholomew* died; and that *Elizabeth* the wife of *Bartholomew* obtained letters of administration *de bonis*



bonis RICHARDI BATYNE non administrat. by Elizabeth the wife of Richard Batyne, who took John Rose to husband, and they let to the plaintiff, and the defendant ousted him; and if, &c.

Rose  
against  
BARTLETT.

This Case was argued by CALTHROP for the plaintiff, and by GERMYN for the defendant.

THE FIRST QUESTION was, Whether this lease for years be devised to Elizabeth for life, remainder to Bartholomew?—And ALL THE JUSTICES, absente RICHARDSON, resolved, that if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; and if a man hath a lease for years and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void.

If a man hath fee-simple lands and lands for years, the lease will not pass by a devise of "all my lands and tenements;" sed aliter if he hath no fee.

2. Vern. 250.

1. Peere Wms.

Term Rep. C.B.

286. 2. Peere Wms. 457. 3. Peere Wms. 26. 2. Atk. 450. Caf. Temp. Talb. 179. 26. See also 1. Brown's Rep. Ch. 79. Vezey, 271. Cowp. 43. 299. 657. 1. Term Rep. 105.

SECONDLY, They all agreed, that if one deviseth his land which he hath by lease to his executor for life, the remainder over, that there ought to be a special assent thereto by the executor, as to a legacy, otherwise it is not executed; and there was not here any special assent.

An executor must give special assent, to the devise of a term to him for life with a

remainder over. 8. Co. 94 b. Cowp. 293.

THIRDLY, JONES, Justice, and MYSELF, were of opinion; that it appears here that he had other lands in fee which he devised to his wife durante viduitate, and other lands which he devised to her for life, the remainder over; and then that devise may not extend to that lease. But BERKLEY, Justice, to the contrary; because it may be, that land devised as long as he is unmarried, is the sole land which he had in fee, and the other land devised absolutely is the lease for years. But it was thereto answered, that the devise is to her for life of the lands in Burnham and Hitcham; so as it is clear it extends not to lease-lands, but to freehold lands.

Devise of lands for life shall not extend to a lease of lands, if he had other lands than the leasehold in the same place.

2. Andr. 123.

1. Vezey, 272.

2. Bl. Rep. 728.

1303.

1. Ter. Rep. 105.

FOURTHLY, Richard Batyne making his wife his sole and whole executrix of all his cattle, corn, and moveable goods, and not mentioning what shall be done concerning the residue of his estate, Whether the wife be absolute executrix quoad all his estate, or only particular executrix quoad his cattle, corn, and moveable goods, and not quoad his leases and his debts?—And as touching that point we all agreed, that one may make several executors, the one quoad things real, the other quoad things personal, and may divide their authority, yet quoad creditors they are all executors and as one executor, and may be sued as one executor. 19. Hen. 8. pl. 8. Dyer, fol. 3. 32. Hen. 8. Br. "Exec." 155. But JONES, Justice, and MYSELF, conceived, as this Case is, that she is sole and absolute executrix for the whole estate, as well leases as debts and other things; for when he saith, that she shall be his sole and whole executrix of his cattle, corn, and moveable goods, it is but an enumeration of the particulars, and no exclusion of any, especially when he doth not make any other executor for the residue; and catalla in Latin extends to all things. And it may be intended that so was his intent, when he made not any other executor.

A testator may appoint separate executors of distinct parts of his property. 19. Hen. 8. pl. 8. Dyer, 3. Bro. Ex. 155. Moor, 12. 1. Roll. A. 914. R. 613.

CRO. JAC.

U

Eut

ROSE  
against  
BARTLETT.

If administration be granted  
"omnium bonorum et creditorum concernentem, &c." it will be a general administration, though only some particulars are mentioned in the will.

Cro. Jac. 394.  
1. Sid. 100.  
1. Salk. 36.  
1. Com. Dig. 263.  
Douglass 542.

But BERKLEY, *Justice*, conceived, that she is a special executrix *quoad* the things enumerated, and no general executrix.

THE FIFTH QUESTION was, Admitting that she is no absolute executrix as to all the estate, but as to the particulars specially named, and she proving the will, and it being found that administration was committed to her "*omnium bonorum jurium ac creditorum dictum*" RICHARDUM BATYNE *et ejus testamentum qualitercunque concernent.*" Whether that be a general administration committed, or only an administration of the goods whereof she was made executrix? —BERKLEY, *Justice*, held, that it is but a special administration, because it is "*bonorum jurium et creditorum predict.*" RICH. BATYNE *et predict. testament. concernent.*" and that coupled to the testament, so that it extends no further than the will. But JONES and MYSELF were of opinion, that it was a general administration committed; for *jurium et creditorum* are general words, and the word "*et*" should be expounded as "*aut*," and it cannot be tied only to the testament; for there are not any words of debts, as "*creditorum*" imports, and they are as general words as are usual in general letters of administration. Wherefore, upon all the matter, JONES, *Justice*, and MYSELF, were of opinion against the plaintiff, that he should be barred. But BERKLEY, *Justice*, *è contra*; *per quod adjournatur.*

## CASE 4.

Sir Thomas Fynch against Lambe.

Michaelmas Term, 5. Car. 1. Roll 295.

To non assumpsit infra sex annos, on a promise to pay 500l. at A.

a replication that the plaintiff within the time sued an original on which the defendant was outlawed, that the outlawry was declared void, and that within a year after he brought another action for 600l. in a different county, is good, notwithstanding the variance, if it be averred for the same cause.

Ante, 160. 280.

Jones, 312.  
Co. Lit. 282.  
Stiles, 442.

1. Lut. 297.

1. Lev. 11.

3. Lev. 245.

Catch. 136. 294.

ERROR of a judgment in the common pleas in an *assumpsit*; supposing that the defendant, 16. Jac. 1. at Bury in Suffolk, promised to pay, &c.

After verdict and judgment upon *non assumpsit* pleaded, and found for the plaintiff, the defendant brings error, and upon diminution alledged the original was certified to be in Hilary Term, 4. Car. 1. upon which the plaintiff in the writ of error pleads the statute of 21. Jac. 1. of Limitations; and that this action, being upon a promise in 16. Jac. 1. and not brought within six years after the promise, nor within three years after the statute, is not maintainable.

The defendant pleads, that he 2. Car. 1. which was within three years of the statute, brought a writ original of *assumpsit* supposed to be made in Kent against the defendant, now plaintiff in the writ of error, wherein he was outlawed; but in 3. Car. 1. the outlawry in the common pleas was declared void and he discharged; and that within a year after he brought this action, and supposeth the promise to be made at Bury to his damages of six hundred pounds, and that in the former action the *assumpsit* was alledged to be made in Kent to his damage of five hundred pounds; and he avers that it was one and the same promise and cause of action.

Upon this plea the plaintiff in the writ of error demurred.

TWISDEN shewed the cause to be, for that this new action varied in the county from the *assumpsit* and in the damages alledged, and cannot be intended one and the same cause of action, nor to be a new suit begun for the same matter.

2. Mod. 140. 1. Sid. 55. 1. Com. Dig. 155. 3. Bac. Abr. 509. 516.

Also I conceived, that forasmuch as this outlawry was not reversed by error, but avoided by plea, the first original is not determined, but he might have proceeded thereupon; and then to begin a new original, and in another county, is not according to the 21. Jac. 1. c. 16. nor within the intent of the statute.

But RICHARDSON, JONES, and BERKLEY, held, that this variance of the county and damages is not material to the action, being transitory, and averred to be for one and the same cause; and although the outlawry is not reversed by a writ of error, but avowed by plea, it is all one within the intent of the statute, for the statute is not where the outlawry is reversed by error, but where the outlawry is reversed, so it is by any means. Therefore, upon their three opinions, a rule was given, that judgment should be affirmed.

SIR THOMAS  
FYNCH  
against  
LAMBE.

Salk. 424.  
Strange, 719.  
Ld. Raym. 1427.  
1441.  
1. Will. 167.  
3. Term Rep.  
663.

### Eyres against Taunton.

CASE 3.

Trinity Term, 7. Car. 1. Roll 590.

SCIRE FACIAS, in *chancery*, upon a recognizance of two hundred pounds by one *Cawley*, who was returned dead; whereupon a second *scire facias* issued against the heir of *Cawley*, and against the tenants of the lands and tenements of *Cawley* which he had *tempore recognitionis vel postea*; whereupon the sheriff returned the defendant *Taunton* TERRE-TENANT of such lands, and omitted to return any thing concerning the heir. Upon this the defendant pleads, that the said *Cawley* had nothing in the said lands at the time of the said recognizance, or ever after: and upon this they were at issue in chancery, and it was sent hither to be tried; and it was tried, and found for the plaintiff, that *Cawley* was seised, &c.

A return upon a *scire facias* against an heir and terre-tenant is bad, if it say nothing as to the heir. Sed qu. if it is not aided by appearance? Post. 313.  
Jones, 319.  
Cro. Eliz. 896.  
2 Roll. Abr. 461.  
1. Brownl. 37.  
Kit. 279.  
2. Bac. Abr. 208.

After verdict for the plaintiff, MALLETT, for the defendant, moved in arrest of judgment, because nothing was returned concerning the heir, viz. that there was not any heir, or that the heir had nothing; therefore no judgment shall be given: for it is a non-return of the sheriff, and not a mis-return; and it is not aided by the 32. Hen. 8. c. 30. or 18. Eliz. c. 24. or 21. Jac. 1. c. 13. or any of the statutes of *Jeofails*. The reason he alledged that no judgment ought to be given, was, because the *terre-tenant*, without the heir, was not to be charged, and therefore the heir ought to be summoned; and until the heir be summoned, or that it be returned that there is not any heir to be summoned, or that the heir hath not any lands to be charged, the *terre-tenant* ought not to be charged; for the heir might have a release to plead, or other matter to bar the execution, and his land is rather to be charged than the land of the *terre-tenant*, for the heir shall not have contribution against the *terre-tenant* as the *terre-tenant* shall have. Also, if the heir be within age, the *parol* shall demur, and the *terre-tenant* shall have advantage thereof; and therefore, there being nothing returned concerning him, he moved, that no judgment ought to be given.

3. Co. 13. a. 7  
2. Inst. 396.

RICHARDSON, Chief Justice, JONES, and BERKLEY, Justices, held, that the return was not good, because the plaintiff names and sets forth that there is an heir, and there is no return quoad



EYES  
against  
TAUNTON.

the heir, so as to him it is *quasi breve album*, and no return, and is not aided by any of the statutes.

But I was of a contrary opinion, because the defendant hath omitted to take advantage thereof; for having pleaded, and the issue being found against him, he shall not now take advantage for not returning the heir to be summoned, for it may be that there is not any heir, or that the heir hath no land, or may not be found. *Vide* 17. *Edw.* 2. "*Execut.*" 139. b. 18. *Edw.* 2. *ibid.* 142. that the *terre-tenant* in a *scire facias* shall not be warned until it be returned that there be not any heir, or that the heir is warned and comes not in. *Vide* 3. *Hen.* 4. 10. a *scire facias hæredi et terre-tenenti*. The sheriff returns such a *terre-tenant* warned, and speaks nothing of the heir, yet the *terre-tenant* was enforced to answer. And after, *ad informandam Curiam* whether there was an heir, it was ordered, that a new *scire facias* should be awarded (a).  
Cro. Eliz. 396. Hilary Term, and judgment given for the plaintiff. Post. 312.

(a) The principal case was moved again in

On judgment against a person as an heir and terre-tenant in "*riens per descent*," execution shall be only of a moiety of the land. Post 313.—Benl. 192. Jones, 87. Poph. 153. 3 Bul. 317. Carth. 93. Dyer, 344. 5. Com. Dig. 347. Ambler, 15. 17. (b) Hilary Term, 3. Car. 1. Bend. 161. Jones, 87.

THE CASE of *Bowyer v. Rivett* (b) was cited by JUSTICE JONES, that in a *scire facias* against the heir and *terre-tenant* he is charged only as *terre-tenant*; and by pleading "*riens per descent*," and found against him, the execution was of the moiety of his land, and not of all (c), as the heir should have been charged upon a false plea.

(c) By 29 Car. 2. c. 3. a trust in fee simple, and an estate *pur autre vie* which comes to an heir as special occupant, shall be assets in his hands, but he shall not be chargeable, in consequence, to pay out of his own estate. And by 3. and 4. Will.

& Mary, c. 14. if a defendant pleads "*riens per descent*," the day the writ was filed, the plaintiff may reply "*assets before the original*," and the jury shall enquire of the lands, &c.

## Spurftow against Prince.

CASE 6.

**A**CTION on the case, by an executor against the sheriff; for that the testator upon recovery had a *feri facias*, and the defendant made execution and levied the debt, and at the return of the writ did not return it; and afterwards the testator died; whereupon the plaintiff, for that *TORT in vitâ testatoris*, and for the loss which came to him, brought this action. Upon not guilty pleaded, it was found for the plaintiff.

GLYNN moved in arrest of judgment, that this action is not maintainable by an executor, because it is a *personal wrong* done to the testator, for which the executor hath no remedy; for he hath not any remedy by the course of the common law for such personal wrongs; and it is not maintainable by the equity of the 4. *Edw. 3. c. . de bonis testatoris asportatis*: and for that purpose he cited a case in this court of *Levaslon v. Diskins (a)*, which JONES, *Justice*, said he well remembered, where an action on the case was brought by an executor against a sheriff for suffering an escape on mesne process, in the time and at the suit of the testator; and because it was a *personal wrong* to the testator, the action lay not for the executor (*b*). BUT NOTE, no judgment was given there, for the COURT was divided therein.— THE COURT thereupon would advise until the next Term.

An executor or administrator may maintain an action on the case against a sheriff for not returning a *feri facias* on account of his testator.

Latch. 167.  
1. Roll Ab 913.  
Jones, 173.  
R. 205.  
Comb. 430.  
Salk. 12.  
Ld Raym. 40.  
4. Mod. 403.  
See 1 Com. Dig.  
"Administra-  
tion." (13.)  
2. Bac. Ab. 445.  
Cowp. 403.

(a) 3. Car. 1.

(b) See Hambly v. Trott, Cowp. 371.

## Luttrell against Lea.

CASE 7.

**D**EBT in the common pleas, upon a judgment in this court.— The defendant pleaded "*nul tiel record*;" and upon that the plaintiff there obtained a *certiorari* out of the chancery to send the record thither, which by *mittimus* might be sent into the common pleas. And it was much doubted whether such *certiorari* were allowable, because that records in the king's bench shall not be removed out of that court into any other court, for that the pleas here are *coram rege*. And divers precedents were shewn, that such records were by *mittimus* out of the chancery sent into the common pleas, viz. in *Hilary Term, 21. Eliz. Roll 1374*. in debt upon a judgment in this court, upon "*nul tiel record*" pleaded by *mittimus* out of the chancery, it was sent into the common pleas, and judgment for the plaintiff. In *Michaelmas Term, 23. & 24. Eliz. Roll 2013*. *Leex v. Scargill* was such a precedent. In *Hilary Term, 11. Jac. 1. Roll 3455*. *Palmer v. Steward*, debt upon a bond to the sheriff for appearance, he pleads, *comparuit ad diem*; the plaintiff denies it, and, by *mittimus* out of the chancery, it was brought into the common pleas, and judgment there was given. In *Hilary Term, 11. Jac. 1. Roll 1715*. *Fylipps v. Mannings*, such plea and judgment, and divers other precedents were shewn; wherefore it seemeth that such course is well allowable. *Sed adjournatur*.

On "*nul tiel record*" pleaded to an action of debt in C. B. on a judgment in B. R. the record may be removed by *certiorari*.

4. Inst. 73.  
1. Roll Ab. 394.  
Dyer, 22. b. 187.  
1. Lev. 2. 3.  
1. Sid 329.  
Hob. 135.  
2. Com. Dig.  
17.  
2. Atk. 317.  
1. Saund. 97.  
99.  
2. Hawk. P. C.  
9.





## Easter Term,

9. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*William Noy, *Esq. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*} *Justices.*Symms *against* Lady Smith.

Hilary Term, 6. Car. 1. Roll 1066.

CASE 1.

COVENANT; for that the defendant had covenanted that she would make a lawful surrender of such copyhold land, upon reasonable request, and that she would permit the plaintiff to enjoy the said lands, and to receive the rents quietly, without interruption.— And the plaintiff shews, that she was a copyholder of such lands, and alleges the custom, that she might surrender by letter of attorney into the hands of two tenants out of court: and shews, that he caused a letter of attorney to be made for the said *Lady Smith* to seal, to give authority to such two persons named therein to surrender at the next court, and tendered it to her to seal; and she would not seal it, nor surrender at the next court, holden such a day, and that she received the rents of the said lands for such a time, and so brake her covenant by not surrendering upon that request.

A covenant to surrender a copyhold upon request is not broken by refusing to execute a letter of attorney to make such surrender. Ante, 176.

Godb. 445.  
1. Roll Abr. 442. 467.  
Jones, 314.  
Styles, 107.  
1. Mod 62.  
9. Co. 76.  
2. Com. Dig. 495.  
4. Term Rep. 484.

The defendant pleads, that the plaintiff tendered to her a letter of attorney to seal; and because she did not know what was therein contained, she required reasonable time to be advised by her counsel thereupon: and the plaintiff refused to give her any time to be advised thereon; for which cause she did not seal it.

The plaintiff, upon this plea, demurs. And being argued at the bar by BAALL, *for the plaintiff*, and by BEARE, *for the defendant*,

THE COURT resolved, FIRST, That the breach is not well assigned; for she is by her covenant to make surrender upon request, but is not bound to make a letter of attorney to make a surrender; so the breach is not assigned according to the covenant.

SECONDLY, It was moved, that forasmuch as she is to make a surrender upon reasonable request, admitting that she ought to make a letter of attorney, she should have reasonable time to be advised after request; for there is difference where she is to make it upon request: for there she ought to have done it presently upon the request, and shall have no time to advise with counsel; but where she is to do it upon reasonable request, she shall have reasonable time to advise thereof.—But ALL THE COURT held, that there was not any difference, where it is to be done upon request, or upon reasonable request.

There is no difference between an act to be done upon request and upon reasonable request.

1. Roll. Ab. 442.  
2. Co. 3. b.

THIRDLY,

A request to make a power of attorney to surrender is not a request to make a surrender.

1. Roll. Ab. 467.

THIRDLY, It was moved that it was a breach of the covenant, because she did not surrender at the next court; and that a request to make a letter of attorney to surrender, implies a request to make a surrender.—*Sed non allocatur*: for it ought to be an express request to make a surrender, and not an implied one. Wherefore it was ruled, that judgment should be entered for the defendant, unless, &c.

CASE 2.

Lancaster against Keyleigh and Steymson and Steymson his Bail.

*Qu.* If bail may have a writ of error on a judgment in *scire facias* by 27.

*Eliz. c. 5.*; but if they may, the principal and bail cannot join; for the judgments against them are several.

Ante, 142. 186. Post. 408. 464.

575. Godb. 440.

1. Jones, 325. 360.

Cro. Jac. 171. 384.

Hob. 72. Yelv. 157.

1. Roll. 294. 2. Saund. 116.

2. Will. 414. 5. Mod. 230.

1. Salk. 263. Andrews, 287. 5. Com. Dig. 283. 271.

ACTION ON THE CASE. The plaintiff recovers against Keyleigh one hundred and thirty pounds damages in the king's bench, to which action the said Steymson and Steymson were bail: and the judgment being against the principal, and after (upon a *scire facias*) against the bail, error was brought by the principal and the bail in one writ of error, returnable in the exchequer chamber, supposing the error to be "*in redditione judicii et in adjudicatione executionis ad damnum ipsorum*," &c.

SIR JOHN BANKS hereupon moved, that this record might not be removed upon this writ of error; for the bail may not have a writ of error in the exchequer chamber by the statute of 27. *Eliz. c. 5.* which gives this writ only in the seven cases mentioned therein, and in no other; for it being a new law which gives authority only to that court, may not be extended larger than the statute limits.

SECONDLY, Though the bail may have a writ of error, yet one writ of error lieth not jointly for the principal and the bail, because there are several judgments given against them: and the damages against the one is not against the other; wherefore they may not join in a writ of error no more than tenant for life and he in reversion; or the tenant and vouchee may join.

ALL THE COURT was of this opinion.

1. Bac. Abr. 217, 218. 2. Bac. Abr. 212.

CASE 3.

Pruett against Drake and his Wife.

Easter Term, 8. Car. 1. Roll 271.

Dower does not lie for a common in gross. After verdict "*communio passura*" shall not be intended divided common; but a common appendant or appurtenant, of which a wife is dowable without demand.

S. C. Jones, 375. S. S. I. Roll.

Abr. 675. 1. Roll. 177. Co. Lit. 30. b. 32. a note (6). Godb. 21.

ERROR of a judgment in the common pleas in DOWER. The error assigned was, Because the writ and declaration made demand of dower in A MESSUAGE, 160 *acras terræ*, 60 *prati*, 100 *pasturæ*, et de *communio passur. pro omnibus averiis, cum pertinentiis*, &c. The tenant pleads, *ne unques seisie quod dower*, &c.; and found for the demandant, and damages attested, and judgment.

Whereas, of common in gross without number, a wife is not dowable; and the damages being entirely given, and judgment accordingly, it was therefore moved by CALTHROP to be error.

ROLLE, for the defendant in the writ of error, agreed, that of common in gross without number a wife is not dowable: but he conceived, it shall not be here intended to be common in gross, but rather appendant or appurtenant. And although it was said, if it

were

were common *appendant* or *appurtenant*, it need not be demanded, but is included in the land, *cum pertinentiis*, and that it is now *his petitum*, yet that is no cause of abatement of the writ; for if he had pleaded in abatement for that cause, it should not prejudice the defendant, for she might have abridged her *plaint*; and after judgment it is no cause to reverse it. And precedents were shewn in the common pleas in *Easter Term*, 4. Car. 1. Roll 1066. *Peckham v. Wickham*, where in dower the demand was in the same manner of lands and common; and upon pleading, demurrer being for parts and a verdict for part, judgment was for the defendant.

And now being debated, ALL THE COURT *seriatim* delivered their opinion, that as the case is, the common may be intended *appendant* or *appurtenant*, whereof dower is demandable; and it shall not be intended to be *common in gross without number*, whereof a *feme* is not dowable; and the rather, being after verdict, which finds, that he was seised *quod dower*, &c. And by intendment it appeared upon the evidence, that it was such a common as went with the land whereof she was dowable: and if it had been *common in gross without number*, the judge before whom the trial passed would have directed it to be found against the defendant; and therefore (it being also in case of dower, and to affirm a judgment) the most favourable construction shall be made: and although the words are, "*et de communia pasturæ*," &c. yet it shall not be intended divided common, but rather an enumeration of the things demanded: and the other judgment being in the same manner upon a demurrer, they all agreed, that it was no error; and therefore the judgment was affirmed.

PRUETT  
against  
DRAKE and his  
WIFE.

Dower will not  
lie for a tencement.  
Strange, 625.

### Baldwin against Wine.

CASE 4.

Hilary Term, 8. Car. 1. Roll 181.

**EJECTMENT** on a lease of tithes in *Roughton*, made by *Charles Baldwin*, as appertaining to such a chapel. The ejectment supposed in taking of so many loads of tithes of wheat and barley, being severed from the nine parts. Upon not guilty pleaded, it was found for the plaintiff.

An ejectment will lie on a lease for tithes. S. C. Jones, 321. 15. Hen. 7. pl. 8. Co. Lit. 159. 11. Co. 25. b. 1. Roll. Rep. 68. Dyer, 84. 116. Latch. 62. Ld. Raym. 136. 789. Carth. 390. 3. Black. Com. 206. Dougl. 305.

GRIMSTON now moved in arrest of judgment, that an *ejectment* lies not of tithes only; but it may be of a rectory, or of such a chapel, and of the tithes thereto appertaining, so as he may be ejected of or from a thing in possession, whereof an *habere facias possessionem* may be, but not of tithes only.

THE COURT would advise. But it being afterwards moved again, it was adjudged for the plaintiff (a).

1. Com. Dig. 287. 3. Com. Dig. 113.

(a) See 27. Hen. 8. c. 21. 32. Hen. 8. c. 7. 2. & 3. Edw. 6. c. 13.

### Barnaby against Rigalt.

CASE 5.

Michaelmas Term, 8. Car. 1. Roll 364.

**ERROR** of a judgment in the common pleas in an action of the case upon an *assumpsit*; and declares upon the custom of merchants, whereby if one for wares delivered to him or his factor make a bill of exchange, directed to a merchant, and the merchant promise to pay it; and the Court will intend the parties to be within

The acceptance of a bill of exchange amounts, by the custom of merchants, to a the custom.

to



BARNABY  
against  
RIGALT.

1. Roll. Ab. 6.  
Cro. Jac. 306.  
Carth. 3. 510.  
Comb. 190.  
Co. Lit. 182.  
Salk. 125.  
3. Mod. 226.  
5. Mod. 367.  
10. Mod. 287.  
Ld. Ray 175.  
Cowp. 572.

to whom it is directed accept thereof, and after refuse to pay, and this is *protested* before a public notary (a), that then he who delivered the bill is bound to pay it: and alledges in fact, that the said *Rigalt* delivered in *France* such wines of the value of 200l. to *John Stile*, factor of the said *Barnaby*, and he thereupon delivered a bill of exchange for the said money to *J. N.* who accepted thereof, and had not paid it; whereupon he brought his action. The defendant pleaded *non assumpsit*; and found against him, and judgment for the plaintiff.

And error was assigned, Because the action is grounded upon the custom of merchants, and doth not shew that the plaintiff was a merchant at the time of the delivery of the bill of exchange.

But because he was named to be a merchant in the declaration, and the bill is for merchandize sold, THE COURT would not intend but that he was a merchant at that time, &c. Wherefore the judgment was affirmed.

(a) See 9. & 10. Will. 3. c. 17. and 3. & 4. Ann. c. 9.

CASE 6.

Blunden against Baugh.

Hilary Term, 7. Car. 1. Roll 1106.

A. being seised of an estate in fee, permits his son to enter into the lands and to occupy them as a tenant at will; the son afterwards leases the lands by indenture for twenty-one years, rendering rent; the father may at his option construe this demise to be a *disseisin* or not a *disseisin*.

S. C. Jones, 115.  
Latch. 53.  
1. Roll. Ab. 661.  
Co. Lit. 57 a.  
note (3). 153. b.  
271. a. note (2).  
323. a.  
5. Com. Dig.  
478.  
Palmer, 201.  
Powell on Cont.  
40.  
1. Burr. 60 79.  
111.  
5. Burr. 2830.

**E**RROR of a judgment in the common pleas. *Baugh* brought an ejectment of lands in *Blechingley* of the demise of *Charles Earl of Nottingham* against *Blunden*. Upon not guilty pleaded, a special verdict was found, that 39. *Eliz.* CHARLES LORD HOWARD, Lord Admiral, being seised of the said land in tail, by indenture covenanted, in consideration of marriage betwixt *Sir William Howard* his eldest son and heir and *Elizabeth* daughter and heir of *Lord St. John*, to suffer a recovery of those lands to the use of the said *William* and *Elizabeth*, and the heirs male of the body of the said *William*, with divers remainders over: that the marriage took effect, and the said *William* entered by the assent of his father and occupied at his will; and in 4. *Jac.* 1. by indenture demised that land to *Thomas Humphrys* and *John Humphrys* for twenty-one years, rendering 115l. rent: they enter, and were possessed *prout lex postulat*: and being so possessed, the said *Charles*, THEN *Earl of Nottingham*, and the said *William*, THEN *Lord Effingham*, by indenture covenanted with *Sir Robert Dormer* and Others (for that the said indenture of 39. *Eliz.* was not executed for the performance of the assurances and uses comprised therein) to levy a fine of those lands to the use of the said *William Lord Effingham* and *Elizabeth*, for a jointure for the said *Elizabeth*, and to the heirs males of the body of the said *William*, the remainder over as in the indenture, &c.; which fine was levied accordingly, and to the uses in the said indenture mentioned: that in 9. *Jac.* 1. the said *William Lord Effingham* died without issue male of his body; and *John Humphrys* died: and in 14. *Jac.* 1. *Thomas Humphrys* being seised or possessed *prout lex postulat*, by indenture

Cowp. 693. 701.

inrolled

BLUNDEN  
against  
BAUGH.

enrolled within six months, in consideration of a competent sum of money, bargained and sold the said lands to *Charles Lord Effingham*, son and heir apparent to the earl, and his heirs. *Charles Earl of Nottingham* dies; *Charles* now *Earl of Nottingham*, being his son and heir, entered. *Blunden*, the defendant, by the command of the said *Elizabeth*, entered and claimed it as her jointure. And *Charles*, now *Earl of Nottingham*, son and heir of the said *Charles Earl of Nottingham* the Lord Admiral, entered, and made a lease for three years to the plaintiff, who entered; and the defendant, as servant of the said *Elizabeth*, and by her command, OUSTED him. And if *super totam materiam* the Court should adjudge for the plaintiff, they found for the plaintiff; if otherwise, for the defendant; and they found the said *Elizabeth* to be yet alive,

After arguments at the bar in the common pleas and at the bench, it was, by the opinion of *RICHARDSON*, Chief Justice, *HUTTON*, and *VERNON*, adjudged for the plaintiff, against the opinion of *HARVEY*, Justice who argued strongly for the defendant. And hereupon a writ of error was brought, and the error assigned only in the matter of law. And it was divers times very well argued at the bar by *LITTLETON*, Recorder of London, and *SERJEANT BRAMPSTON*, for the defendant in the writ of error, and by *CALTHROP* and *SERJEANT HENDEN*, for the plaintiff; and afterward by all the Justices of the king's bench *seriatim*.

And *JONES*, *BERKLEY*, and *MYSELF* held, that the judgment was erroneous. The main question was, Whether by any of these acts there was a *disseisin* committed to *Charles Earl of Nottingham melens volens*; and if there be a *disseisin*, who should be the disseisor and tenant to the freehold? And to the first, *JONES*, *BERKLEY*, and *MYSELF* held, that the law will not impute nor construe it to be a *disseisin* unless at the election of *Charles Earl of Nottingham*, when as none of the parties intended it to be a *disseisin*, nor to OUST him of the possession: for, as *Co. Lit.* 153. b. defines, "a *disseisin* is when one enters, intending to usurp the possession, and to OUST another of his freehold;" and therefore *quærendum est à judice, quo animo hoc fecerit*, why he entered and intruded; and it is at the election of him to whom the wrong is done, if he will allow him to be a disseisor, or himself out of possession: and therefore if one receive my rent, it is at my election if I will charge him with a *disseisin*, by bringing an assise or other action, or have an account. And if an infant make a lease for years rendering rent, and the lessee enter, it is at the election of the infant to charge him in assise, or to bring debt for the rent, or to accept the rent at his full age, as 7. *Edw.* 4. 6. and other books be. So it is if one enters, claiming as guardian in *socage*, or by *nurture*, where he is not, it is at the election of the infant to bring an assise, or to charge him as guardian, thereby admitting him to be in without wrong; as 40. *Edw.* 3. 10. 40. *Edw.* 3. "Accomp't," 35. & 33. *Hen.* 6. 2. and many other books be. And tenant at will is at the will of both parties; and the will shall not be determined by every act. *Vide* 28. *Hen.* 8.

Dyer, 62. a.  
R. 228. 351.

432, &c.  
1. Bl. Rep. 677.  
3. Wils. 527.  
Cowp. 303.

Lit. sec. 588.

Post. 306.

Co. Lit. 55. a.

BLUNSEN  
against  
BAUGH.

5. Co. 10. a.  
Co. Lit. 55. b.  
1. Sid. 339.

Bendl. 103.  
2 Roll. Rep.  
141. 241. 284  
Bridg. 12.  
Palm. 201. 205.  
1. Roll. Ab. 859.  
W. Jones, 316.  
1. Burr. Rep.  
112.

Post. 370.

Post. 388.

R. 354.  
Cro. Jac. 660.  
Cro. Eliz. 830.

28. Hen. 8. 62. *Kelway*, 20. Hen. 7. 65. So where a feme lessee at will takes husband, or a feme makes a lease at will, and takes husband, although the feme hath put her will in her husband, yet it shall not be said a determination without the election of the lessor or husband to the contrary. 38. Hen. 8. *Dyer*, 62. Lessee surrenders, and yet occupies, he is no disseisor, but at the pleasure of the lessor, 11. Aff. 6. where a man makes a feoffment and continues in possession: and the common case where a copyholder makes a lease for years, not warranted by the custom, yet it is no disseisin; and the law accounts it a good lease betwixt lessor and lessee and all strangers: and to that purpose was cited *Hilary*, 18. Jac. 1. Rot. 792. *Streat v. Virrall*, EJECTIONE FIRMÆ brought upon such a lease; and upon special verdict adjudged for the plaintiff, that it is a good lease against all but the lord. And they all relied upon another judgment in the point, betwixt *Powsley v. Blackman (a)*, where one Carr bargains and sells land, by indenture inrolled, to *Bertram*, upon condition that upon payment of three hundred pounds at the end of three years it should be void; and that in the interim the bargainee should not meddle with the profits of the land, the bargainor occupies and makes a lease for five years, and at the day doth not pay the money; the bargainee doth not enter, but (the bargainor occupying it) he devised the land: and it was adjudged a good devise; but if he had been disseised, the devise had been void. And here it shall not be intended that the son intended to disseise his father, but that the lease was made by the assent of the father: also the party to whom the lease is made doth not claim any freehold, but to have the lease only, and to pay his rent, and pays the rent accordingly; so there was no intent in any of the parties to make a disseisin, then the law shall not construe it to be a disseisin *partibus invitis*. And hereby it follows, that the freehold remains in *The Earl of Nottingham* until the fine levied by him and his son; and so the uses well raised, and the jointure well assured.

SECONDLY, Admitting there were a disseisin committed by these acts, the question is, Who is disseisor and tenant of the freehold? —And JONES, BERKLEY, and MYSELF held, that *William Lord Effingham*, who made the lease, is the disseisor and tenant; for when tenant at will takes upon him to make a lease for years, which is a greater estate than he may make, that act is a disseisin; and by this lease for years made, and the lessee's entering and paying the rent unto him, and he accepting thereof, he is in as lessee, and the lessor is the disseisor, and hath the reversion expectant upon this lease; and this lease betwixt them is an interest derived out of the inheritance gained by this disseisin: for if a lessee for years make a feoffment although it be a disseisin to the lessor, yet it is a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee is in the per; as 4. Edw. 2. Brev. 403. 19. Edw. 2. Brev. 770. 15. Hen. 3. Brev. 878. F. N. B. 201. 8. Hen. 7. 6. per *Fineux temp. Edw. 1. Counterplee de Voucher*, 126. & Co. Lit. 367. a. And warranty may be annexed to such an estate, upon which he may vouch, as 52. Edw. 3. 12. And if such lessee for years, or at will, makes a gift in tail, or a lease for life, that creates a good lease or a good gift

(a) Cro Jac. 659.



BLUNDEN  
against  
BAUGH.

in tail amongst themselves and all others, besides the first lessor; and as to him they are both disseisors, as it appears by the books 14. *Edw.* 4. 6. 18. *Edw.* 3. *Issue*, 36. 7. *Edw.* 3. *Issue*, 7. 14. *Edw.* 3. *Feoffments et Payts*, 67. So it is where a lessee at will makes a lease for years, especially by indenture, it is a good lease between them, and debt lies for the rent; and the lessee shall not avoid it but by an *ouster* by the first lessor, as 22. *Hen.* 7. 26. is.—

And JONES cited *Spark v. Spark* (a), where lessee at will made a lease for years, and he, being ousted by a stranger, brought an ejectment and recovered; and betwixt *Streat and Virrall*, ut supra. And so it was resolved in this court, 28. *Eliz.* that an *ejectione firme* lies upon a lease made by a copyholder not warranted by the custom against any stranger; and the Year-Book of 12. *Edw.* 4. 13. is directly to the point; so here, when lessee for years enters according to the lease, and pays his rent, the freehold betwixt them shall be in *William Lord Effingham*, who made the lease, and not in *Humphrys*, who is only lessee; and then the fine levied by *The Earl of Nottingham* and his son conveys well the freehold, and the uses are well raised upon this fine, and the jointure well settled; and then during her life *The Earl of Nottingham* hath no title to make a lease; wherefore the judgment ought to be reversed; and so much the rather for the great mischief which would ensue, if one who hath a tenant at will, who makes a lease for a small time, and the first lessor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uses, &c. if he should be adjudged disseised, and as a disseisee to levy a fine which should tend to the benefit of the lessee for years, and be adjudged a disseisor against his intent or knowledge, as in this case is pretended, many should lose their inheritances. In many manors are divers tenants at will, where the father is tenant at will, and after him the son enters and occupies at the will of the lord, and is so reputed, and the lord allows them, and never accounted them as disseisors; if such tenants at will make under-leases for a year, or half a year, if the lords of those manors levy fines of those manors, and this should tend to the benefit of the under-lessees, who should be reputed to be disseisors without the intent of any of the parties, many lords should hereby be disinherited: whereupon they concluded, that *Humphrys* the lessee was neither disseisor nor tenant, but only *William Lord Effingham*, and he is the disseisor and tenant; and the fine levied by *Charles Earl of Nottingham*, and *William Lord Effingham his son*, is a good fine, and the uses well raised, whereby *Elizabeth* the wife of the said *William Lord Effingham* hath good title, and the defendant under her. Wherefore the judgment ought to be reversed.

But RICHARDSON, *Chief Justice*, argued to the contrary, and continued his former opinion, that *Humphrys* is the disseisor, and was tenant of the freehold at the time of the fine levied: and then the fine by *The Earl of Nottingham* (being a disseisee, and his son *William Lord Effingham* adjutor to the disseisin) shall inure to bar the right of *The Earl of Nottingham*, and for the benefit of the said *Humphrys*, according to the opinion in 2. *Co.* 56. *Buckler's Case*; and that he is a disseisor to *The Earl of Nottingham*, not at his pleasure, but *de necessitate*; for a disseisin is a tortious ousting of any one from his

(a) Cro. Eliz.  
676.  
Hetley, 73.  
Moor, 569.3. Com. Dig.  
258.Post. 484.  
1. Burr. III.  
114.

1214. Post. 484.

BLUNDEN  
against  
BAUGH.

Ante, 303.

Cro. Jac. 660.  
Cro. Eliz. 830.  
Co. Lit. 57. a.  
Carth. 101.

(a) Plow. 530.  
21. Edw. 3. 4.  
45.

Ante, 304.

See Taylor on  
the demise of  
Atkins v. Horde.  
1 Burr. Rep.  
111. and  
Cowp. 701.

feisin; and here this taking of the lease by *Humphrys* from *Lord Effingham* tenant at will, and his entering by colour of the said lease, is a disseisin. And here is an entry *usurpando jus alienum* without consent of *The Earl of Nottingham*: and as tenant at will may not grant his estate, as 27. Hen. 6. pl. 3. is, no more may he make an estate; and *The Earl of Nottingham* hath no election to say it is no disseisin. But he agreed to the case, where an infant makes a lease for years, reserving rent, and the lessee enters, the infant hath election to allow him to be his tenant, or to be a disseisor, which is most for his advantage: so where one enters and claims as guardian and occupies, the infant may allow him either disseisor or accomptant, which shall be for his best advantage.

SECONDLY, He held, that *Humphrys* is the sole disseisor and tenant of the freehold; for he, by his entry, did the sole act which made the disseisin: for the lease for years is merely a void contract; and when one enters by colour of a void conveyance, he is the disseisor, as in *Crofts v. Howels* (a) where a guardian assigned dower to a *feme* who is not dowable, and she enters, by her entry she is a disseisoresse, 24. Edw. 3. pl. 43. If one enters by colour of a void extent, it is at the peril of him who enters and takes the profits, to see by what right he enters. And he denied that the making of a lease for years, is either an express or implied command to enter or make a disseisin. And he denied that the making of a lease for years had gained the reversion to the lessor; but if lessee for years, or at will, makes a lease for life, or gift in tail, he, by making livery, transfers the freehold, and gains to himself the inheritance, but by a nude and void contract he cannot gain the reversion. Whereupon he concluded, that *Humphrys* is the disseisor and tenant, and that the fine inures to the benefit of *Humphrys*, and not to the limitation of the uses in the indenture, because none of the parties had any thing in the land at the time of the fine levied; and that the judgment ought to be affirmed.

But afterwards, for the reasons of us three, the judgment was reversed.

NOTE, SIR ROBERT HEATH, *Chief Justice* of the common pleas, CRAWLEY, *Justice*, BARON DENHAM, and BARON TREVOR, agreed with this judgment in the king's bench; and conceived that it would be very mischievous if it should be adjudged otherwise. But SIR HUMPHRY DAVENPORT seemed to doubt whether the lessee for years ought not strictly to be taken for the disseisor and tenant.

CASE 7.

Blizard against Barn.

Hilary Term, 8. Car. 1. Roll 816.

Where other  
verges are joined  
to an action  
for words, the  
plaintiff shall  
have full costs,  
Strange, 645.

ACTION; for that *falso et malitiosè* he spake of him these words: "That the plaintiff committed felony, and procure him to be arrested for felony, and to be imprisoned for three days."

though the damages are found under 40s. Ante, 141. 163.—Salk. 207. Carth. 22. Andr. 375. 2. Com. Dig. 546.

The defendant pleads "not guilty;" and found against him generally, and damages to twenty shillings.

BLIZARD  
against  
BARN.

It was moved, that he might have no more costs than damages, the damages being under forty shillings, upon the statute of 21. Jac. 1. c. 16.

But because there was a precedent shewn in the case of *Edwards* Dougl. 667. 780. 1. Term Rep. 665. 3. Term Rep. 138. 391. 654. v. *Topfall* (a), where in an action for words, and for falsely and maliciously procuring him to be indicted of felony, and upon not guilty pleaded it was found against him, and damages taxed but at forty shillings, yet because the action was not for words only, but for other wrong whereof he is found guilty, he had full costs awarded him, it was resolved here to be out of the statute.

(a) Ante, 163.

### The Earl of Newport against Sir Henry Mildmay.

CASE 8.

Michaelmas Term, 6. Car. 1. Roll 439.

**E**RROR to reverse a judgment in a writ of entry for the manor of *Wansted* against the *Earl of Newport*, where he appeared by his guardians, the *Earl of Southampton* and others, wherein they vouched the common vouchee; and judgment was given upon his default after appearance.

If an infant suffer a recovery and come in as vouchee, by himself, by attorney, or by guardian, and vouch the common vouchee, and he makes default, he shall be bound by it.

The error assigned was, Because judgment is given by default, he being an infant.

1. Roll. Ab. 731. 751, 752. 2. Roll. Ab. 573. 1. Leon. 211. 322.

It was argued at the bar by SIR JOHN BANKS and others, for the plaintiff in the writ of error, and by NOY, the King's Attorney, and others, for the defendant.

Jones, 38. 318. Hobart, 197. 224.

THE COURT resolved, that it was not error; for the judgment is not given upon default of the infant, but upon departure of the vouchee in despite of the Court: and the Court is trusted, that they will not admit a guardian, but such as shall answer to the infant for his loss, if he hath any; and it is intended to be for his advantage: and common recoveries are common assurances of the realm, and ought not to be shaken; nor is there any pretence for an infant, who appears by his guardian, more than for any other person at full age: and it appears by 9. *Edw. 4. pl. 34.* and by many precedents shewn in the time of *Henry 7. Henry 8. Edw. 6. Queen Mary, Queen Elizabeth*, and *King James*, and in the time of this king, that such recoveries have been suffered from time to time. And every precedent is a judgment, not *sub silentio*, but in the conuance of the Court; and it would be inconvenient to avoid so many recoveries; and it stands with law, that such recoveries may be. Wherefore, without any open argument, the judgment was affirmed, notwithstanding the opinion of 10. Co. 43. a. *Mary Portington's Case*, to the contrary.

1. Sid. 321. Cro Jac 465. Cro. Eliz. 472. Dyer, 220. 1. Lev. 142. 2. Inst. 483. Godb. 161. 1. Vern. 461. Lev, 83. Salk. 567. Strange, 94. Pigot on Recov. p. 64. 1. d Ray. 113. Co. Lit. 380. b.

3. Com. Dig. 163. 2. Bac. Abr. 504. 3. Pac. Abr. 136. Cruise on Recov. 148. Note (1). 2. Term Rep. 159.

Sir



CASE 9.

Sir George Symonds *against* Sir Michael Green and William Green his Son,*In Chancery.*

If a person seised in fee of a manor, and other reputed manors, purchase other freehold lands occupied therewith, and makes a gift in tail comprising as well the freehold lands as part of the manors, and then makes a mortgage by the words, "All the lands thereto appertaining, or reputed part of the same, or within the same," the parcels of land divided from the manor by the intail, and the freehold lands, though purchased only two years before, shall pass by this mortgage.

Ante, 17. 57.  
169.

Dyer, 97. 362.

Moor, 190.

Cro. Eliz. 16.

2. Roll. Ab. 186.

1. Mod. 251.

2. Mod. 69.

Savil, 26.

2. Com. Dig.

532.

3. Com. Dig.

443.

Cowp. 304.

Dougl. 716.

1. Term Rep.

435.

THE LORD KEEPER, being assisted by HUTTON, *Justice*, and JONES, *Justice*, in former hearings, and by ME in this last hearing, IT WAS DECREED, that Whereas Sir William Green was seised in fee of the manors of *Great-Milton* and *Little-Milton*, and the reputed manors of *Great-Chilworth* and *Little-Chilworth*, in the parish of *Milton*, and of divers lands in *Chilworth*, purchased 30. *Eliz.* of Sir Michael Dormer, and of other lands purchased 1. *Jac.* 1. which one Ives occupied together until 3. *Jac.* 1. : and then in consideration of the marriage of Sir Michael Green his son with one Millefent Reade, with whom he had 4500l. COVENANTS to stand seised of the said manors of *Great-Milton* and *Little-Milton*, and of divers particular closes, by name in *Chilworth*, and of all his other lands, tenements, and hereditaments to the said manors appertaining, or used and occupied with them, to the uses following, viz. of the manor and premises, to the use of himself for life, without impeachment of waste ; and after, of such a manor and some of the closes by name, to the use of Anne his wife for her jointure ; and of other the particular closes before-mentioned, to the use of Millefent for her life for her jointure ; and after the decease of Sir William, Anne and Millefent, to the use of the said Sir Michael Green and the heirs males of his body, with a remainder to his right heirs : afterward Sir Michael Green and Sir William Green joined in a BARGAIN AND SALE of the manors of *Milton* and *Chilworth*, and all the lands thereto appertaining, or reputed as part of the same, or within the same ; and they levy a fine by the name of THE MANORS and ten messuages, six hundred acres of land, two hundred *prati*, and seven hundred of *pasturæ*, which quantity comprised as well the freehold lands as the manors.

The question was, Whether the parcels of land divided from the manor by the intail, and the freehold land lately purchased, should pass by this mortgage ?

And they ALL RESOLVED, that the lands intailed, which were parcel of the manor, shall not be said to be severed from the manor : for the freehold never being severed, but remaining entire in Sir William Green during his life, shall pass as parcel of the manor at the time of the mortgage ; and that the freehold bought in and occupied with the manor, although it was but for two years before the mortgage, may pass, being said and reputed parcel, and by that name : and the fine is well enough guided by the indenture for the manors and for the freehold purchased, although they were not *in rei veritate* parcel of the manor ; and a little time is sufficient for the gaining a reputation : WHEREFORE IT WAS DECREED, that Sir George Symonds should enjoy the manor and the freehold purchased ; and that Sir Michael Green and his son should make further assurance at the cost of Sir George Symonds ; and that this indenture is a sufficient declaration of the uses of a fine, as it was declared by all the said Justices and by the Lord Keeper himself.

Johns

Johns *against* Stratford.

CASE 10.

*Michaelmas Term, 8. Car. 1. Roll 96.*

**D**EBT upon an obligation of two hundred pounds, upon condition to come to his lodging, and to go with him to the council A serjeant at arms of the marches of Wales is not an officer within 23. Hen. 6 c. 10.  
at Wales.

The defendant pleaded (a) the 23. Hen. 6. c. 10. and that the plaintiff is a serjeant at arms, attending upon the president and council of the marches of *Wales*, and took that bond under colour of an attachment out of the said court, and so void.

The plaintiff hereupon demurred.

HENDEN, *Serjeant*, moved, that he was not any officer intended within that statute, which extends only to sheriffs and their bailiffs, and other ministers and guardians of prisons; and serjeants at arms are not any of these officers, but immediate to the council of the marches of *Wales*: also the said council is a court erected of late time and since the said statute, and cannot be intended within the statute.

And THE COURT seemed to be of that opinion, but did not resolve therein.

But because it is shewn, that the plaintiff made the arrest out of the marches, that is to say in *London*, which is out of the jurisdiction, &c. then clearly this obligation is out of the intent of this statute; therefore rule was given, that judgment should be entered for the plaintiff, &c.

(a) It is now decided to be a public act, of it, though it is not pleaded. 2. Term and therefore the Court will take notice Rep. 509.

The Statute cannot be pleaded to a bond given to an officer of an inferior court upon an arrest out of his jurisdiction.  
2. Vent. 257.  
1. Saund. 157, 162.  
Dyer, 119. 364.  
1. Lev. 214.  
1. Sid. 383.  
Cro. Eliz. 66.  
Raym 62. 220.  
Hardres, 464.  
Doug. 94.  
1. Term Rep. 418

Starre *against* Buckhold.

CASE 11.

**A** PROHIBITION was granted upon the motion of GRIMSTON to stay a suit in THE ARCHES for these words "Thou art a drunkard, a drunken fellow, a base idle drunken fellow," because these words tend to a temporal offence, and are punishable as a temporal offence (a), and not punishable in the ecclesiastical court.

To call a man a drunkard, is a temporal offence.  
Ante, 285.

(a) See the statutes 4. Jac. 1. c. 5 the 21. Jac. 1. c. 7. and the 22. Geo. 2. c. 33.

# Trinity Term,

9. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt.* Chief Justice.

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

William Noy, *Esq.* Attorney General.

Sir Richard Sheldon, *Knt.* Solicitor General.

} Justices.

CASE I. Thomas Gwin and Bridget his Wife against David Gwin.

Hilary Term, 5. Car. 1. Roll 295.

In a quod ei  
desorciat against  
husband and  
wife, if the  
wife plead as  
tenant for life  
of part of the  
premises, with  
reversion to her  
husband, and  
say nothing as  
to the residue,  
and judgment  
be given against  
both as to all  
the premises, it  
is erroneous.

S. C. Godb.  
448.

2. Inst. 350.

Jones, 381.

Cowp. 766.

Dougl. 683.

**E**RROR of a judgment in the grand sessions in the county of Brecknock, by DAVID GWIN, in a quod ei desorciat, PROTESTANDO "prosequi breve illud in formâ et naturâ brevis de recto ad communem legem, secundum formam statuti RUTLAND, de tribus messuagiis, 200 acris terræ, 100 acris prati, 60 acris pasturæ, et 100 acris bosci, et medietatem molendini in LLAUNYHAGELL, et jus et hæreditatem suam; et unde dicit, quod ipsemet fuit seiscitus de tenementis prædictis et medietate prædicti molendini in dominico suo ut de feodo et jure, &c. Et quod tale sit jus suum, offert, &c." And the said THOMAS and BRIDGET ven, et defen, jus prædicti. DAVID et seiscinam, &c. and imparlq, &c."—At the next sessions the plaintiff counts ut antea verbatim; and the defendant BRIDGET pleads, that she "majus jus habet tenendi 100 acris terræ, 30 acras prati, et 40 acras pasturæ, parcel. tenementorum modo petit, pro termino vitæ suæ, reversionem inde præfato THOMÆ et hæredibus suis, quam prædictus DAVID habet ad tenendum tenementa prædicta, &c. Et de hoc ponit se super patriam; et prædictus DAVID similiter. Et prædictus THOMAS dicit, quod ipse habet majus jus tenendi tenementa prædicta et medietatem prædicti molendini, cum pertinentiis, ut illa tenet, quam prædictus DAVID, &c. Et de hoc ponit, &c. Et prædictus DAVID similiter." The jury found both issues for the demandant; and judgment entered, "quod recuperet versus præfatos THOMAM et BRIGETTAM prædicta tenementa et medietatem prædicti molendini cum pertinentiis tenend, sibi et hæredibus suis quiete de præfatis THOMA et BRIGETTA et hæredibus suis in perpetuum, &c."

Upon this judgment a writ of error was brought; and because the writ of error supposed that the proceedings were in curiâ nostrâ, where it appears by the record that the beginning thereof was in 22. Jac. 1. therefore the writ of error was abated, and a new writ of error brought coram nobis resident.; and upon it divers errors were assigned by MR. PROTHORO:

FIRST, That the writing being a quod ei desorciat, the protestation being prosequi in naturâ brevis de recto, he ought to shew what writ of right, for there be divers kinds of writs of right.—But that was disallowed.

SECONDLY, That the DEFENCE is not well made; for in a writ of right there ought to have been a double defence, viz. the plaintiff's right, and to maintain his own right.

THIRDLY



THIRDLY, That the defendants, joining in defence, ought not to have severed in their pleas.

FOURTHLY, That the plaintiff, having admitted them to plead several pleas, and taken several issues upon their several pleas, hath admitted that they are several tenants, and so hath abated his own writ.

FIFTHLY, Because *Bridget* pleads as tenant for life for part of the tenements, alledging the reversion to be in *Thomas*, and for the residue pleads nothing, nor claims any estate, yet judgment is given against *Thomas and Bridget* and their heirs, for all the tenements; and so a final judgment against the *feme* for all where she pleads but to part, and against her heirs where she claims but for life.

And THIS WAS HELD a manifest error: wherefore, for this cause principally the judgment was reversed.

GWIN  
against  
GWIN.

The King against Sherington Talbot.

QUO WARRANTO, by which he claims liberty of free warren in *Ridge* and two other towns in the forest of *S.*

The defendant disclaims to have such liberties in the said two villis and in the forest. But as to his claim of warren in *Ridge*, he pleads, that he is seised in fee of the manor of *Ridge*, whereof the said vill of *Ridge* is parcel; and that he and all his ancestors, and all whose estate he hath in the said manor, have had, time whereof, &c. liberty of free warren in all the said manor, and within the demesnes thereof, *ita quod nullus fugabit* any game of warren within the said manor and demesnes thereof *sine licentiâ* of the said *Sherington Talbot*.

Issue was taken, that he and all those whose estate, &c. had not free warren within the said manor and demesnes thereof; and found for the defendant.

Noy, *Attorney General*, now moved in arrest of judgment, FIRST, That the plea is not good to prescribe to have warren in the said manor and demesnes of the manor; for although he may prescribe to have it in his own demesnes, yet he cannot prescribe to have it in the lands of others his freeholders, nor ought he to prescribe to have it pertaining to his manor; and for that purpose he cited *The Book of Assizes* (a), that one ought not prescribe to have *turbary* in another's land as appertaining to his manor. SECONDLY, Because it is by prescription, *ita quod nullus sine licentiâ* SHERINGTON TALBOT, which is impossible to be, for the time whereof, &c.

ROLLE answered to these objections, FIRST, That a prescription to have free warren in his manor is good as well in the lands of the freeholders as in the demesnes; for being by prescription, it is intended, that this liberty was before the creation of the freeholders, whose estate was extracted out of the demesnes of the manor after the beginning of this prescription.—SECONDLY, That the allegation thereof is not of necessity, and doth not vitiate the prescription.

GRIMSTON also moved in arrest of judgment, THIRDLY, That the trial was by *venire facias* awarded from *Ridge*, where it ought

to have been by *venire facias* awarded from *A.* if the *venue* be from *A.* instead of the manor of *A.* it will be a mis-  
—But see the 24. Geo. 2. c. 18. l. 3.

CASE 2.  
A prescription to have a free warren in a manor and in the demesnes thereof is good. Ante, 17.  
1. Roll. Abr. 619.  
Jones, 320  
Cro. Jac. 156.  
327.  
6. Co. 14.  
1. Peers Wms. 227.

On issue on a plea of prescription to have

(a) 5. Assise, pl.

THE KING  
against  
TALBOT.

to have been of the manor, for *Ridge* is alledged to be but parcel of the manor.

And ALL THE COURT, for this cause, held it to be a *mis-trial*, and not aided by any of the statutes; and that it ought to be of the manor, which is the greater and the more notorious: wherefore a *venire facias de novo* was awarded.

The statutes of  
*Jeofail* do not  
extend to in-  
formations  
*quo warranto*,  
or to proceed-  
ings on penal  
statutes.

And it was moved, Whether this were within the statutes of *Jeofails*, because it concerns the king, and the statutes have an express *proviso*, that they shall not extend to appeals or indictments or informations on penal laws, and cited some of them, but not any *quo warranto*?

RICHARDSON, *Chief Justice*, JONES, and BERKLEY, held, that the statutes did not extend to this case, nor to informations of intrusion, for the king is not bound unless he is named.

But NOY, *Attorney General*, said, peradventure it should be otherwise in case of a *quare impedit*, where the suit is betwixt the party and the king.

2. Lev. 139.  
3. Lev. 375.  
1. Salk. 325.  
1. Com. Dig.  
343.  
4. Burr. 2527  
Cowp. 392.

But see now the 9. Ann. c. 20. as to informations in *quo warranto*, and the Case of *Acheson v. Everet*, Cowp. 392. that the statutes of *Jeofail* extend to penal actions, though not to criminal prosecutions.

#### CASE 3.

#### Townley against Chalenor.

*In the Chancery.*

Trustees shall  
only be answer-  
able for the  
monies they  
respectively re-  
ceived.

UPON a bill of review to reverse a decree there, THE LORD KEEPER required the assistance of JUSTICE JONES, by whom the decree was made, and of JUSTICE HUTTON, JUSTICE BERKLEY, JUSTICE CRAWLEY, and MYSELF.

8 C. Bridge 35.  
Hardres, 314.  
1. Salk 318.  
Prec. in Ch.  
173.  
3. Ark 584.  
1. Peere Wms.  
81.  
2. Vern. 241.  
504. 515. 570.  
5. Bac. Ab. 402.  
See the Case  
Sadler v. Hobbs,  
26. Geo. 3.  
2. Brown's Ch.  
Rep. 114. and  
Bartlett v. Hud-  
son, 1. Term  
Rep. 42.

The Case was, That *Thomas Foster* and *Townley* being assignees in trust of a lease to the benefit of *Chalenor* an infant, *Thomas Foster* took all the profits, and was in arrear upon account 1500l. and being unable to satisfy, the question was, Whether *Townley*, agreeing to this assignment by sealing the counterpart thereof, and joining with *Foster* in acquittances of the rents for a year and a half (but never more meddled), shall be charged only for that wherein he hath joined in the acquittances, or for all the residue?

And IT WAS RESOLVED, that *Townley*, being but a party intrusted, shall not be answerable for more than came to his hands; for it was the default of him who put them in trust to repose trust in one who was not able to pay, and he being the party trusted as well as *Townley*, *Townley* shall not be compellable to satisfy his defect. Wherefore it was resolved, THAT that part of the decree whereby he was charged to pay what *Thomas Foster* could not, ought to be reversed.

#### CASE 4.

#### Eyres against Taunton.

*Cujus Principium ante, page 295.*

The first *seire facias* on a re-  
cognizance  
ought to be in  
the county  
where acknow-  
ledged; but on  
a return that he  
*seire facias* shall issue

IT was moved again by MALLETT for the defendant in stay judgment. Whereas the plaintiff the last Term procured a *seire facias* out of this court, directed to the sheriff of Gloucester, to summon the heir of *Cawley*, because he did not make any mention in his former return of the heir, and thereupon this writ issued out of the court, *ex officio Curiae ad informandum Curiam*, and he hath no lands, that no heir can be found, or that the party is dead, a *testatum seire facias* shall issue to another county. Ante, 296. 5. Com. Dig. 214. 347.

ERRORS  
against  
TAUNTON.

sheriff had returned, that *Cawley* had not any lands in his bailiwick which descended to his heir, nor any heir within his bailiwick, &c. that yet no judgment ought to be given :

FIRST, Because this *scire facias* ought not to have been awarded to the sheriff of *Gloucester* but upon a *testatum* that the first *scire facias* was awarded to the sheriff of *Middlesex*, where the recognizance was first acknowledged ; for being grounded upon a record, he ought first to sue the *scire facias* there ; and upon return that there is not any heir there, then to have this in another county : and he cited *The Book of Entries*, 500. and 2. *Edw.* 3. 20.—*Sed non allocatur* : for true it is, the first *scire facias* upon a recognizance to have execution ought to be in the county where it was acknowledged ; but when it is sued there, and the party returned dead, it may be sued against the heir or *terre-tenant* in any county where the party surmisseth he hath land. Also this *scire facias* is *ex officio Curie*, and in favour of the party, and there is no reason he should take exceptions to it.

Salk. 598.

THE SECOND EXCEPTION was taken to the return of the writ ; for it is returned, that there is not any heir within his bailiwick, where it ought to have been, that there is not any *terre-tenant*, and that there is not any heir generally.—*Sed non allocatur* : for the return upon the first *scire facias* shews what land he had, and it shall not be intended there be more lands when no heir is found there, and the sheriff hath no authority to enquire into other counties.

THE THIRD EXCEPTION, That the return upon the second *scire facias* in chancery, whereupon the plea is pleaded and issue joined, was insufficient, for the reasons before alledged, and the trial ill.—But now ALL THE COURT agreed, although the return had been better if it had found who was heir and that he was warned, or that there was not any heir in the said county, yet it is well enough ; for as 17. *Edw.* 2. tit. "Execution," 139. anciently the *scire facias* was only against the *terre-tenant*, and the heir was not charged in the *scire facias* but as *terre-tenant* ; and if the return be not good or formal, yet it is aided by the statute of *Jesfairs* ; and the mis-return or insufficient return of the sheriff also, *quoad* the heir (because he is not named in the return), is but a *discontinuance*, which is aided by the statute of *Jesfairs*. Wherefore RICHARDSON, JONES, and BERKLEY, agreed, that there was not any cause after verdict to stay judgment, whereto I assented.

THE FOURTH EXCEPTION, That it was not a good trial by *nisi prius* ; for issue being joined in chancery, and the record delivered into the king's bench to be tried, it ought there to have been tried, and not by *nisi prius*.—But ALL THE COURT was against it ; for issue, being joined betwixt party and party, may well be tried by *nisi prius* out of this court, and so are many precedents. Wherefore judgment was given for the plaintiff.

4. Term Rep. 401.

Randall against Scory.

CASE 5.

Easter Term, 8. Car. 1. Roll 422.

ERROR of a judgment in the common pleas, in a *replevin*, where the defendant avows for an *heriot*, upon a lease made by indenture If a declaration state a lease "to A. B. and C. paying a heriot after the death of A. his executors and assigns," and it appear on over of the lease to be "to A. B. and C. paying an heriot to the lessor after the death of the said A. B. and C. and every of them," the variance is fatal. Post. 416.

ture



RANBALL  
against  
SCORY.

S. C. 1. Roll.  
Abr. 451.  
S. C. Hetley, 57  
1. Roll. Ab. 192.  
2. Roll. Abr.  
451.  
3. Bac. Abr. 53  
Cowp. 173.  
766.  
Doug. 666.  
1. Term Rep.  
236.

ture to *Robert Chichester*, his executors and assigns, for ninety-nine years, if the said *Robert Chichester*, *John Bellun*, and *James Bellun*, or any of them, shall so long live, rendering rent; and "rendering" and paying after the death of the said *Robert Chichester*, his executors and assigns, his or their best beast for an *heriot*, or fifty shillings, "at the election of the lessor, his heirs or assigns;" and because the said *Robert Chichester* assigned this lease to the plaintiff, and after died, for non-payment of the *heriot* after the death of the said *Robert*, he distrained; and avows, &c. The plaintiff demands over of the indenture, which was entered in *hæc verba ut prius*. But the clause for the *heriot* was, "rendering and paying to the lessor, his heirs and assigns, after the death of the said *Robert Chichester*, *John Bellun*, *James Bellun*, and every of them, his or their best beast in the name of an *heriot*, or fifty shillings, &c." *ut antea*. And for this variance the plaintiff demurs, and judgment given for the plaintiff, and error thereof brought. The error assigned was in point of law.

ROLLE, for the plaintiff in the writ of error, moved, that this is no variance, and that the avowry is good; for the lease being to him, his executors and assigns, the reservation of the *heriot*, in construction of law, is the reservation of him, his executors, and assigns, viz. after the death of him, his executors, or assigns, his or their best beast; for it cannot be construed the best beast of *Bellun and Bellun*, for they are strangers to the deed, and have nothing to do therewith.

BUT ALL THE COURT held, that there is a plain and manifest variance; for although the best beast of *Bellun and Bellun* cannot be construed to be meant thereby, yet the reservation is not, that it shall be paid after the death of the executors or assigns, but only after the death of *Chichester, Bellun, and Bellun*, so as they are the parties after whose death the limitation of the *heriots* are to be paid, and not after the death of the executors or assigns. Wherefore the avowry was ill, and the judgment affirmed.

#### CASE 6.

Fishmongers may be indicted for ingrossing, notwithstanding the exception in

5. Edw. 6. c. 14. and the indictment may be tried at the same session of gaol delivery it is found, on issue joined by the clerk of the peace.

#### Penn's Case.

PENN, a fishmonger of London, was indicted at Newgate sessions, For that he ingrossed divers kinds of fish, viz. smelts, whittings, &c. *ea intentione ad revendendum contra formam statuti*. Unto this he pleaded not guilty; and the indictment was moved hither by *certiorari*.

HENDEN, Serjeant, moved in arrest of judgment, that by the express words of the act of 5. Edw. 6. c. 14. (a), fishmongers, butchers, &c. are not said to be ingrossers, nor within the statute for ingrossing, if they buy only things belonging to their trade: for it is not the intent of the statute to restrain them, it being necessary and for the benefit of the subjects that they should buy such things.

BUT THE COURT held, that although they be not within the statute for ingrossing, yet if they regrate and sell at unreasonable prices, they are expressly within it; and he is indicted, that he bought *ea intentione ad revendendum contra formam statuti*, and he is found guilty.

(a) Repealed by 12. Geo. 3. c. 71. See Hawk. P. C. 6. edit. 8vo. 484.

so it shall be intended that he ingrossed, and did not sell at reasonable prices; and if he ingrossed and sold at reasonable prices, it ought to have been shewed to the jury upon the evidence, as all the Court agreed, there being a proviso contained in the act, that one may take advantage by giving in evidence without formal pleading thereof: and forasmuch as he is found guilty, it shall be intended, that he ingrossed *contra formam statuti*. Wherefore rule was given, that judgment should be for the king against the defendant, unless other matter were shewn to the contrary upon the *Monday* following.

At which day GRIMSTON moved, that the trial was ill, because it was tried at the same sessions that he was indicted; which ought not to have been, but to have had a *venire facias* returnable at the next sessions: and he relied upon 22. *Edw. 4. "Corone," 44.—Sed non allocatur*: for it is the usual and common course to try it at the same time the party is indicted; especially as this case is, being at the gaol-delivery and the party in prison. *Vide 9. Hen. 8. Kelloway, 159.* that trial before justices of gaol-delivery may be the same day.

Keilw. 159. 256. 1 Sid. 335. 2. Hawk. P. C. 572. 5. Bac. Abr. 239.

THIRDLY, He shewed that the entry is, that the defendant pleaded not guilty; "*et de hoc ponit, &c. ET JOHANNES MICHAEL qui pro rege sequitur similiter, &c.*" and it doth not appear by what authority he joined that issue; for the king's attorney, or one that is *in loco suo*, ought to have joined.—*Sed non allocatur*: for the said John Michael is the clerk of the peace in London, and he is an officer known to the said court where the indictment was taken, and it needs not to be so mentioned in the record; and the Court here knows it well enough. Wherefore IT WAS ADJUDGED accordingly for the king.

Justices of gaol-delivery may order a jury to be returned instantly for the trial of a prisoner arraigned before them.

Post. 340. 448. 583.

3. Com. Dig. 512. Cases in Crown Law.

### Porter against Hutchman.

CASE 7.

ERROR of a judgment in the common pleas, in action on the case in nature of a conspiracy. The error assigned was, Because in the declaration it is supposed that he procured him to be indicted, and not to be imprisoned until he was *legitimo modo acquietatus*, and doth not say *inde*.

In an action for a malicious prosecution, it is sufficient for the plaintiff to state that he was *legitimo modo acquietatus*, without adding *inde*.

WARD, Serjeant, moved, that it was error; for it was a word of substance, and the cause whereby he entitles himself to the action: and he said, that this judgment passed *sub silentio* in the common pleas. And that in two other such actions brought by the same party against two others being moved in arrest of judgment, after verdict it was adjudged for the defendant. A record was shewn in this court in *Hilary Term, 41. Eliz. Roll 1069. Pricket's Case*, where, after verdict for the plaintiff, this exception was moved in arrest of judgment; and it appears upon the roll that no judgment was given.—And RICHARDSON, Chief Justice, said, that he was of counsel with the defendant; and for this cause only the judgment was stayed.

BULSTRODE, for the defendant, shewed, that in *Easter Term, 7. Jac. 1. Roll 407. Bell v. Gamble (a)*, in the like action on

(a) Cro. Jac. 230.

the

PORTER  
against  
HUTCHMAN.

the case, where the word *inde* was omitted, and exception taken for that cause, yet after divers motions in stay of judgment, and divers continuances, judgment was given for the plaintiff.

JONES and BERKLEY, *Justices*, were of opinion, that the judgment should be affirmed, because it shall not be intended but that he was *acquietatus inde*, and not of any other matter: and the precedents are both ways, and in the writ of conspiracy *inde* is omitted; and by the same reason in action upon the case, the omission of *inde* is no cause to avoid the judgment.

BUT RICHARDSON, *Chief Justice*, and MYSELF, much doubted thereof, by reason of those two last judgments, and of *Pricket's Case*, and conceived, that the declaration was ill for this omission; for if he were not *acquietatus inde*, it is clear an action would not lie: and therefore, being the material clause which maintains the action, the omission thereof is fatal; for a declaration shall not be aided by intendment in the point of the action: and in the greater part of the precedents in print the word *inde* is in the declaration.—*Et adjournatur* (a).

(a) It was moved again, and the declaration adjudged to be good. Post. 420.

## CASE 8.

## Anonymous.

The omission of the oath required by 21. *Jac* 1. c. 5. in *qui tam* will not vitiate the record.

- 3. Inst. 193.
- 4. Inst. 272.
- Sed vide* Salk. 367.
- And. 25.
- 3. Com. Dig. 519.
- 1. Bac. Ab. 40.
- 2. Hawk. P. C. 333, 384, 385.
- 3. Term Rep. 362. *accord*.

Informers may sue for a moiety of the penalty given by 5 *Eliz*. c. 4; for it is only the king's moiety that shall be given to the corporation. Moor, 886. Hob. 183. 5 Com. Dig. 573.

**E**RROR of a judgment in *Coventry*, in an information upon the 5. *Eliz*. c. 4. s. 31. for exercising the trade of an ironmonger (a), not being apprentice. After verdict and judgment there for the plaintiff,

THE FIRST ERROR assigned by GRIMSTON was, Because by the 21. *Jac*. 1. c. 5. it is appointed, that every common informer shall be sworn before his information shall be received, that the fact was within the year before the information exhibited, and within the same county where it is exhibited; and it doth not appear here that it was done so in this case.—*Sed non allocatur*: for it is no parcel of the record, but is only a direction to the officers that none shall be received, unless he be first sworn (b).

(a) See White v. Bote, 2. Term Rep. 274. *contra*; but Leigh v. Kent, 3. Term Rep. 362. *accord*.

THE SECOND ERROR, Because informers cannot sue on that statute to have the moiety; for by the express words in the statute the forfeiture is given to the corporation, for the benefit of the corporation, for relief of the poor, and for other uses of the corporation.—*Sed non allocatur*: for though that statute gives one moiety to the informer, and the other moiety to the king, except in corporate towns to whom such forfeitures are granted, it is to be understood, and so hath always been expounded, that in that case the forfeiture given to the king belongs to the corporation, and the informer is to have his part still. Whereupon judgment was affirmed.

(a) *Vide* 5. Com. Dig. 571. Post. 516.

## CASE 9.

## Parker against Taylor.

Michachmas Term, 8. Car. 1. Roll 366.

Debt on an obligation and on a mutuuus may be joined.

- Reb. 147. 1. Vent. 366. 2. Co. 87. Raym. 233. 3. Lev. 99. 3. Term Rep. 433. 659. 777.
- 4. Term Rep. 347.

**E**RROR of a judgment in *Beverly Court* in DEBT; where the plaintiff declares in debt of 20l. viz. 11l. upon an obligation, and 4l. upon a mutuuus. The defendant pleaded *quoad* the 4l. NON



DEBET, *et de hoc ponit se super patriam; et prædictus quærens similiter.* Et quoad the other, he demands oyer of the obligation and condition, which was read to be upon condition to pay eight pounds at a day, &c. and he pleads payment at the day, *et de hoc ponit, &c.* and the plaintiff *similiter*, and verdict for the plaintiff quoad the bond; and quoad the other for the defendant; and judgment for the plaintiff.

PARKER  
against  
TAYLOR.

The error assigned was, That here is not any issue; for the defendant ought to have pleaded *quod solvit, et hoc paratus est verificare*, and the plaintiff ought to have replied *non solvit, et hoc petit, &c.* so there had been an affirmative and a negative; but as it is here there is no issue at all, and it is not aided by any statute; and therefore it was prayed, that the judgment might be reversed.

But ALL THE COURT held, forasmuch as the defendant pleads payment, *et de hoc, &c.* and the plaintiff joins with him, that the jury shall enquire whether he hath paid, and the jury finding that he hath not paid, it is good enough, and aided by the 32. Hen. 8. c. 30. of *Jeofails*. Wherefore the judgment was affirmed.

Where a plea concludes to the country, instead of to the court, if issue be joined, the error is aided by the 32. Hen. 8. c. 30. Post. 593. 1 Sid. 290. 341. Cro. Jac. 550. 580. 589. Hob. 233. Stra. 551. Dougl. 94.

Cowp. 407. 755.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

### Leycroft against Dunker.

CASE 10.

Easter Term, 9. Car. 1. Roll 152.

**ACTION FOR WORDS.** Whereas the plaintiff for twenty years had used the trade of a merchant, and yet useth the same; and in the fifteenth year of king James used the said trade, and went to *Hamburgh*, and there used it until 22. Jac. 1. and then returned to *England*, and used the trade of a merchant; the defendant, to scandalize him in his profession, spake these words of the plaintiff the first of October, 8. Car. 1. "He came a broken merchant from *Hamburgh*" (*innuendo* at his returning from *Hamburgh* into *England*); and "that I will justify."

Words importing slander in the time past, as "he came a broken merchant from *Hamburgh*," are actionable. Ante, 199.

The defendant pleaded not guilty; and found against him, and damages 20l.

S. C. Jones, 321. S. C. Hutt. 125. Cro. Jac. 241. 579. 622. Yelv. 153. 1. Com. Dig. 188. 2. Term Rep. 473.

GRIMSTON moved in arrest of judgment, that these words are not actionable; for although it is to be agreed for saying of a merchant "that he is broken," in the present tense, an action lies; for it is all one as if he had said he is a bankrupt, which is a great discredit to a merchant; yet when he saith that he came over a broken merchant from *Hamburgh*, it doth not import in itself any scandal; for he shews that he came over eight years before, and he might become a rich man and of good credit since that time.

RICHARDSON, Chief Justice, was of that opinion; for slander ought to be expressed, and not taken by intendment or implication; therefore if one saith of a merchant, "that he was a poor man within this seven years," or of a workman, that "he was a poor workman, and had little skill within these few years," an action lies not, for he may be a rich or a good workman at the time of the speaking.

But JONES, BERKLEY, and MYSELF held, that the action well lies, and it is not like the cases before put; for there they do not charge him with any crime, and by intendment it may have good construction; but here he chargeth him with being once broken,

et

LEYBROTT  
against  
DUNKER.

(a) *Sed vide*  
Carlake v.  
Maple Durham,  
2. Term Rep.  
p. 473.

*et qui semel malus semper præsumitur esse malus eodem genere*, or at least may have an inclination thereto (a); and it being alledged to be spoken *falso et malitiosè*, and to scandalize him in his profession, it is a great cause of discrediting and impairing him in his trade, whereas their credit is the principal means of their gain: and if he intended it otherwise, or had spoken it in another sense, he ought to have shewn it by special plea, which would have excused him; but when he is charged with malicious speaking of those words, and with an intent to discredit him, and he pleads not guilty, and found against him, that he spake maliciously, and with intent to discredit him, the Court may not otherwise adjudge. Wherefore it was adjudged for the plaintiff.

## CASE 11.

## Green against Lincoln.

To call another  
"a long-shag-  
haired mur-  
dering  
"rogue," is  
actionable.

S. C. Jones, 306.  
1. Roll. Ab. 47.  
1. Sid. 103.  
1. Lev. 90.  
Hardres, 7.  
2. Com. Dig.  
186.  
Cowp. 276.

**ACTION FOR WORDS:** "Thou art a long shag-haired  
"murthering rogue." Upon not guilty pleaded, it was found  
for the plaintiff.

GRIMSTON moved in arrest of judgment, that these words are not actionable; for he doth not charge him directly with the murder of any person, nor saith that he is a murderer, but the words are adjectively spoken; which manner of speaking shews that the words are of chiding, and do not aggravate but extenuate *quoad* the manner of speaking.

HENDEN, *Serjeant*, moved to have judgment for the plaintiff; and cited *Wilson v. Meason* (a) in the common pleas, where it was adjudged after debate, that for these words, "Thou art a murthering  
"knave," action lies; but he had not the record to shew.

THE COURT therefore advised till the next Term: and afterwards, in *Michaelmas Term*, 9. Car. 1. being moved again, it was adjudged for the plaintiff.

(a) 1. Roll. Abr. 47.

## CASE 12.

## Fish against Wagstaff.

Judgment in the  
*Marshalsea* re-  
versed, because  
it was recited  
that they had  
authority to  
hear, &c. "all  
"causes."  
Post. 558. 593.  
Dyer, 175.  
Cro Jac. 314.  
Cowp. 18.

**ERROR** of a judgment in the court of the *Marshalsea*, by virtue  
of a new patent.

The error assigned was, Because in the stile of the court it was mentioned, that the court is holden by virtue of the king's letters patents *coram* such persons, *judicibus nostris, ad audiendum et terminandum assignat. omnia placita personalia inter omnes personas infra duodecim leucas in palatio regis apud Westmon. et inter omnes homines de hospitio domini regis, tam diu quam hospitium domini regis est infra duodecim leucas à palatio Westmon.*

THE COURT. A patent *ad audiendum et terminandum omnes causas* cannot be, but it ought to be only of criminal matters: and for that reason the judgment was reversed.

Sparrow against Matterlock and Others.

CASE 13.

Hilary Term, 8. Car. 1. Roll .

**TRESPASS.** Upon a demurrer the case was, The sheriff re- turns upon an *elegit* that the party had not any lands, but only within the liberty of *St. Edmundsbury*, and that *J. S.* bailiff there, hath the execution and return of all writs, who enquired, and re- turned an *extent* by inquisition; and that the bailiff delivered the moiety of the said land extended to the party, and that the plaintiff by virtue of that *extent* entered and intituled himself. The question was, Whether it were a good title for the plaintiff?

FIRST, Whether the bailiff of a liberty may make an inquisition and extent upon an *elegit* by warrant from the sheriff directed to him?

—RESOLVED, that he may.

SECONDLY, When a jury by inquisition finds the seisin and value of the land, Whether the jury ought to set out the moiety for the plaintiff, or if the bailiff may deliver such part of the land for the moiety?

And IT WAS RESOLVED, that the jury shall extend all the land, and the bailiff where there is a franchise, and the sheriff (where no franchise is) shall deliver the moieties, and not the jury: and so are all the precedents. Wherefore it was adjudged for the plaintiff.

The bailiff of a liberty may execute an *elegit* by warrant from the sheriff; but the jury shall find all the land, and the officer shall deliver the moiety.

- 1. Sid. 91. 239.
- Carth. 453.
- 2. Salk. 164.
- 2. Inf. 396.
- Dyer, 100.
- Cro. Eliz. 584.
- Hobart, 83.
- 4 Co. 65. b.
- 1. Vent. 259.
- 1. Salk. 563.
- Strange, 874.
- 3. Com. Dig.
- 305.
- 5. Com. Dig.
- 445.
- Dougl. 475.

Michaelmas



## Michaelmas Term,

9. Car. 1. In the King's Bench.

*Sir Thomas Richardson, Knt. Chief Justice.*

*Sir William Jones, Knt.*

*Sir George Croke, Knt.*

*Sir Robert Berkley, Knt.*

*William Noy, Esq. Attorney General.*

*Sir Richard Sheldon, Knt. Solicitor General.*

} *Justices.*

**CASE 1.** Thomas Broxon and his Wife *against* Dager and his Wife.

*Trinity Term, 9. Car. 1. Roll 1152.*

The imputation of being a witch generally, without some act of witchcraft alleged, is not actionable.

See 9. Geo. 2.

c. 5.

Ante, 282.

Post, 344.

**ACTION** for these words, spoken by the wife of the defendant of the plaintiff's wife: "Thou art a witch: I will make thee come and say, *God save my mare*: I was forced to get my mare charmed for thee." After verdict, upon not guilty pleaded, and found for the plaintiff,

**LITTLETON**, *Recorder of London*, moved in arrest of judgment, that none of these words are actionable; for the first words, "Thou art a witch," without mentioning that she bewitched any person, cattle, or goods, are too general, and no action maintainable for speaking of them; and he cited divers precedents, that for calling one "witch" generally action lies not, if he doth not shew what witchcraft she committed.

**ALL THE COURT**, upon the first motion, were of that opinion: and for the second words, "I will make thee say, *God save my mare*," there is not implied any witchcraft: and for the last words, "I was enforced to get my mare charmed for thee," was a fault in the plaintiff, who would procure charming, to prevent mischief to her mare. Wherefore rule was given that the judgment should be itaid until, &c.

**CASE 2.**

*King against Edwards.*

*Trinity Term, 7. Car. 1. Roll 992.*

If husband and wife be seised of lands to them and the heirs of the body of the husband, with divers remainders over, he has an estate tail in possession, and not a remainder expectant on the joint estate; and if they join in a feoffment in fee with the third in remainder

and levy a fine, it will be a discontinuance, notwithstanding the husband and those in remainder die without issue.

**EJECTMENT.** Upon a special verdict the case was, *John Boulting* and *Jane* his wife being seised of the land in question, to them and the heirs of the body of *John Boulting*, remainder to *Edward Boulting* and the heirs of his body, the remainder to *William Boulting* and the heirs of his body, remainder to *George Edwards* and the heirs of his body, the remainder to the right heirs of the said *John Boulting*; they being so seised, the said *John Boulting* and his wife and *William Boulting* (the third in the remainder) joined in a feoffment with warranty to *Mathusaleh Keen*; and after, the said husband and wife levied a fine to the said *Keen*: afterwards the said *John Boulting* died without issue, and the said *William Boulting* and *Edward Boulting* died without issue; and in the fifteenth year of king *James* the said *Mathusaleh Keen* died, and the land descended to *Robert Keen*, who, after the death of the wife of

it will be a discontinuance, notwithstanding the husband and those in remainder die without issue.

Jones, 323. 1. Ro. 632. 3. Ld. Raym. 327. Bull. N. P. 100. Fearn, 27. 2. Burr. 712. 3. Bac. Ab. 591. 1. Com Dig. 564. 3 Com. Dig. 76, 77.

the

the said *John Boulting*, entered and let to the plaintiff, and the defendant, by the command of the said *George Edwards*, ousted him.

KING  
against  
EDWARDS.

The sole question was, Whether the entry of the said *George Edwards* was lawful? And it was argued by GERMYN, for the plaintiff, and by MAYNARD, for the defendant.

The FIRST QUESTION was, Whether this feoffment were a discontinuance of the estate tail? And it was urged for the defendant, that it is not any discontinuance; for the husband during the coverture, having a joint estate with his wife in the freehold, had not any estate tail in possession, but *quasi* a remainder in tail, expectant upon a joint estate for life, and not executed; so then, not being seised of the estate tail in possession, it cannot make a discontinuance: and to prove that he cited *Owen v. Morgans* (a), and *Wincot's Case* (b).

If land be given to husband and wife and the heirs of the body of the husband, and the husband make a feoffment and die, this is a discontinuance.

RICHARDSON, Chief Justice, BERKLEY, and MYSELF, as to this point, held, that the estate tail is in him vested and settled, and that his and his wife's feoffment makes a discontinuance: and although it was objected that *William Boulting*, the third in the remainder, joined in the said feoffment, so as it could not make a discontinuance, but that every of them respectively passed their estates, ALL THE JUSTICES agreed, that this joining of *William* is not material; for there is an intermediate remainder in tail to *Edward Boulting*, which is discontinued.

Jones, 324.  
3. Co. 5.  
1. Roll. Ab. 632.  
2. Roll. Rep. 311.  
1. Fearn, 4th edit. 42.  
Cowp. 702.

But JONES, Justice, doubted thereof, and conceived it was not a discontinuance, because the husband was not absolutely seised of an estate tail during the life of his wife.

THE SECOND OBJECTION was, That if this feoffment were a discontinuance at the common law, yet it is taken away as to the wife by the statute of 32. Hen. 8. c. 28.: and as it is taken away as to the wife, so is it also as to those in remainder after the wife, especially the wife surviving; and that the fine after the feoffment is but by way of release; and is no such fine as is intended within the statute; for it ought to be such a fine which at the first passed the estate, and not a fine which inures by way of confirmation.

If a husband make a feoffment of lands whereof he is jointly seised, and dies, and the wife before entry levies a fine, it fortifies the discontinuance created by the feoffment, and neither she nor those in remainder can enter.

But ALL THE JUSTICES agreed, that this feoffment and fine to the same person make but one assurance; and when the wife is barred, and her estate destroyed by the fine, that she cannot enter, those in remainder may not enter, but are in case as they were at the common law: and as this case is, they all resolved, that an express discent being found, it takes away his entry. Whereupon, by the assent of JONES, without further argument, it was adjudged for the plaintiff.

10. Co. 96. a.  
1. Roll. Ab. 634.  
Jones, 324.

JONES, for the first point, cited *Worne v. Webster* (c), where it was held by the Court, that it was not any discontinuance when the wife survived; but if the husband had survived, it should have been otherwise.

(a) 3 Co. 5. (b) 2. Co. 61. (c) Moor, 476.

Sir Richard Snowde against ———.

CASE 3.

ACTION UPON THE CASE. Whereas one *Christmas* exhibited a bill against the plaintiff in the court of chancery, and shews what, &c.; and the plaintiff had put in his answer thereto, "answer to a bill in chancery," is actionable, without alledging the materiality of the perjury; or that there were not other bills than the one stated. Post. 337. 353.

To accuse another of having "forsworn" himself in his perjury; or that

and

SNOWDE  
against

1. Roll. Ab. 42.  
78.

Gro. Eliz. 135.

572. 720. 907.

3. Lev. 166.

1. Com. Dig.

178.

1d. Ray. 259.

TermRep. 69.

and shews what, whereunto he was sworn; that the defendant spake these words of the plaintiff: "He," *innuendo* the plaintiff, is for-  
"sworn in his answer to *Christmas's* bill," *innuendo* in his answer to the said bill. The defendant pleaded not guilty; and it was found against him, and damages assessed to fifty pounds.

BRAMSTON, *Serjeant*, and MR. GRIMSTON, moved in arrest of judgment: FIRST, That he doth not shew in what point he was perjured; for there are divers precedents that indictments of perjury have been quashed for this cause, that they have not shewn the perjury to have been in a point material.—But ALL THE COURT, RICHARDSON, *Chief Justice*, absent, held it to be no good exception; for true it is, that indictments ought to shew the cause of the perjury; but in an action for words, which is grounded upon the speech of another, it cannot be enlarged further than the other spake.

SECONDLY, Because it is not said that he is forsworn in his answer in chancery, nor is it averred that there is not any other bill nor answer but that which is mentioned; and there may be another bill in another place.—*Sed non allocatur*: for when it is shewn there was such a bill in chancery, and an answer thereto, and that the defendant spake those words, and is found by verdict guilty of them upon that occasion, the action well lies without other averment; for it shall not be presumed there was any bill and answer in any other place. Whereupon it was adjudged for the plaintiff.

#### CASE 4.

#### Dorothy Brian against Cockman.

To call a widow  
a whore, and  
say her children,  
though born in  
wedlock, are  
bastards, is  
actionable.

Ante, 269. 296.

436.

4. Co. 18.

1. Roll. Ab. 35.

Hetley, 18.

Gro. Eliz. 639.

2. Bulst. 89.

3. Bulst. 48.

Gro. Jac. 323.

2. Sid. 397.

1. Com Dig.

185.

**ACTION FOR WORDS.** Whereas the plaintiff was of good fame, and always free from adultery or fornication and other crimes, and after the death of *Brian* her late husband was in communication with one *Cowley* for a marriage betwixt them; that the defendant, to deprive her of her fame, and to hinder her from the said marriage, spake of the plaintiff these words: "She is a whore, and her children (*innuendo* her children which she had by the said *Brian* late her husband) are *Brambish's* bastards," *innuendo* one *Nicholas Frambish*. Upon not guilty, it was found for the plaintiff.

GRIMSTON moved in arrest of judgment, that these words are not actionable: for, for calling "whore" there lies not any action; and to say that "her children by her former husband are *Frambish's* bastards," is repugnant in itself; for they cannot be bastards which were born in the time of her former husband,

But ALL THE COURT held, that the action well lies: for to say of a widow who is in communication of marriage with another, that "she played the whore in her former husband's time," is a great discredit; and to say that "her children are bastards" (although in truth they cannot be bastards in law, yet in reputation they may be so), is cause of loss of her marriage, and that none will marry with her. Wherefore it was adjudged for the plaintiff.



## Edwards against Woodden.

CASE 5.

Hilary Term, . Car. 1. Roll 602.

**REPLEVIN.** The defendant made *consuſance* as bailiff to *John Cotton*; for that the place WHERE is twelve acres, parcel of a meadow in *Staunsted*, parcel of the manor of *Staunsted*, of which manor one *George Bing*, *esq.* was seised in his demesne as of fee; and so seised by indenture, in the 12. *Jac.* 1. granted a rent-charge of thirty pounds to *Sir Robert Heath* and others in fee issuing out of the said manor; and that they, by indenture inrolled within six months in the chancery, for three hundred pounds, granted, bargained, and sold that rent to the said *John Cotton* and his heirs; wherefore for rent arrear at such a Feast he made *consuſance*, &c. The plaintiff in bar of the *consuſance* confesses, that the land is parcel of the manor, and that *George Bing* was seised of the said manor in *dominio suo ut de feodo*, *PROUT* in the *consuſance*; and that the said *George Bing*, so being seised, granted the said rent to *Sir Robert Heath* and others, *PROUT*, &c. *Sed quod diu antea* the said *GEORGE BING* *aliquid habuit* in the said manor, and long time before the grant of the said rent, one *John Leigh* was seised in fee of the said manor, *unde*, &c.; and so seised, in 5. *Eliz.* devised that manor to *Richard Blunt* for one hundred and twenty years, by virtue whereof he entered and was possessed; and so possessed, 17. *Eliz.* granted the same to *Thomas Blunt*, who entered, and in 31. *Eliz.* assigned that lease to the said *George Bing*, who likewise entered and was possessed; and so possessed, in 37. *Eliz.* assigned it to *Henry Bing*; and that he, 22. *Jac.* 1. assigned it to *Hammond Claxton*, who entered, and was, and yet is possessed, and licensed the plaintiff to put in his cattle; who thereupon put in his beasts, and the defendant distrained them, &c. Upon this the defendant demurred, and shewed for cause:

FIRST, That he doth not confess or traverse the grant to *Cotton*.

SECONDLY, That he doth not shew how the seisin and grant of the said *George Bing* is avoided.

THIRDLY, Because the plea is repugnant in itself.

And now being argued at the bar by *ROLLE*, for the defendant, he shewed, that this plea to the *consuſance* is ill, because in the *consuſance* it is pleaded, that *George Bing* was seised in his demesne as of fee, and granted that rent, &c.; which is intended as a seisin in fee in possession: then when the plaintiff confessed that he was seised in *dominio suo ut de feodo prout*, it is a confession of the seisin of the fee in possession; and when he afterwards shewed a lease for years by another, long time before, and that lease conveyed to the grantor of the rent, and from him by mesne conveyances to the plaintiff, it may be intended, that the grantor was seised of the fee in reversion, and not of the fee in possession; for it is not repugnant to the former part of his confession, and it is not a confession of the seisin alledged: wherefore he ought to have traversed *absque hoc*, that he was seised *alter vel alio modo*, or that he was seised *modo et forma prout*: also, he

In replevin, the defendant makes *consuſance* as bailiff under a seisin in fee of *A.* The plaintiff in bar confesses the seisin of *A.* but entitles himself under a prior lease, by which it appears that *A.* had only the reversion. This is a good confession and avoidance of the seisin in fee by *A.*; but if it were not a full confession and avoidance, it being only a default of traverse, it is aided upon a general demurrer.

Yelv. 140.  
Jones, 402.  
Dyer, 312.  
1. Saund, 207.  
Ray. 170.  
3. Mod. 319.  
1. d. Ray. 424.  
238.

EDWARDS  
against  
WOODDEN.

Post. 494.

he doth not shew how the fee came to the grantor after the lease: also, there is not any full confession that the fee was in the grantor, but by argument, which is not good in pleading; and for these reasons it was moved, that the bar to the *conusance* is ill.

RICHARDSON, *Chief Justice*, and JONES were of that opinion upon the first motion.

But I conceived, that the plea is a good confession and avoidance of the seisin in fee alledged, and there needs not any traverse; for when he entitles himself to a lease for years precedent, yet *in esse*, which is not chargeable with this rent, and allows the reversion in fee, expectant upon this lease, to be in the grantor, the pleading is good; for one seised in fee of reversion, expectant upon a lease for years, may well say that he was seised *in dominico suo ut de feodo*, for of that seisin he may have an assise; and that this plea is good appears in *Adams v. Wrotesley* (a). And to shew how he afterwards came to the fee lies not in the *conusance* of the plaintiff; but he may well admit it without prejudicing himself, he claiming by a precedent estate not subject to that charge: and to take a *traverse* when he claims by a former estate and admits it, is not necessary, and peradventure might be perilous unto him, as 6. Co. 12. *Heyler's Case*.

Post. 581.

1. Leon. 44. 80.
3. Mod. 319.
- Yelv. 151.
2. Saund. 50.

BERKLEY, *Justice*, conceived, although seisin is pleaded *in dominico suo ut de feodo*, which shall be intended seisin in possession, as it is pleaded, yet the plea is good in substance, because he avoids the charge against him by reason of the former estate; and if there be any defect therein, it is only for want of *traverse*, and that is but form; and not being shewn for cause, but other causes immaterial, it is aided by the 27. *Eliz. c.* . and the defendant shall not have advantage thereof.—And to this opinion, for this cause, RICHARDSON and JONES seemed to incline; but they would advise.—*Et adjournatur*.

(a) Plowd.

CASE 6.

John George and his Wife against Harvey.

*Ante*, Page 282.

▲An action will not lie for calling another "a witch," unless some act of witchcraft be alledged.

*Ante*, 261. 282.  
Post. 474.

Cro. Jac. 150.  
306. 399.

1. Roll. 43.  
Moor, 906.  
1. Com. Dig.  
192.

THIS Case was now moved again by ROLLE, for the plaintiff, to have judgment, that action lies for these words, for saying, "She is a witch;" because all kind of witchcraft is punishable by 1. *Jac. I. c. 12. (a)*, and is intended to be such who hath conference with a spirit, and works by spirits.

But ALL THE COURT *seriatim* delivered their opinion, that the action lies not for calling one "witch;" without alledging she hath done some act; but if it be said that if she bewitched any man or any thing, it well lies: but to say she is "a witch" generally, is not actionable; for it is a common saying, "You are a witch," which may be by your tongue or looks, &c. Wherefore it was adjudged for the defendant. *Vide Hawks v. Auge* (b), adjudged accordingly, and *Towse v. Sand. Mich. 10. Jac. I.*

(a) Repealed by 9. Geo. 2. c. 5.—See 1. Hawk. ch. 4. s. 5. (b) Cro. Jac. 331.

:  
o  
.

n

e  
r  
,  
n  
s  
r  
r  
s  
o  
ll  
t  
e  
-

-  
is  
e  
e  
ut  
l,  
l-  
N  
r-

to  
g,  
py  
ce

he  
th  
ny  
ot  
ch  
ed  
y,

yn





## Tyfflyn against Wingfield.

CASE 7.

THE record was, "*Queritur in placito transgressionis pro eo quod vi et armis cepit et chafavit* his cattle into the close of F. S. for which he took them *damage feasant*, and the plaintiff was inforced to pay to him forty shillings for amends, *per quod* he sustained damages, &c." After verdict, upon not guilty, and found for the plaintiff,

HENDEN moved in arrest of judgment, Because he did not conclude *contra pacem*, &c.: for the bill recites, that it is "*placitum transgressionis*," and the declaration is, "*vi et armis*;" therefore he ought to conclude *contra pacem*: and because it is not so done it is ill in substance, and not aided by any of the statutes of *Jeofails*.

But GRIMSTON, *for the plaintiff*, argued, that this is an action upon the case: for the action is not brought merely for the taking or chasing of his cattle, but for a special wrong, *viz.* for chasing them into another man's soil, so as they were there trespassers, and he inforced to compound for this damnification: and although it be *vi et armis*, yet that doth not prove it to be an action of trespass; for that may be in an action upon the case, as it is in *The Earl of Salop's Case*, 4. Co. 50. And although the recital of the bill be *in placito transgressionis*, yet it is not of necessity to be trespass only, but may serve for trespass upon the case.

And ALL THE COURT being of that opinion, it was adjudged for the plaintiff.

An action for chasing cattle into another's close, whereby the plaintiff was obliged to pay, &c. need not conclude *contra pacem*, though the bill is "*transgressionis*," and the declaration "*vi et armis*."

Ante, 254.  
Post. 377.  
2. Roll. Ab. 100.  
Cro. Jac. 122.  
130.  
Hob. 180.  
Vaugh. 101.  
Carth. 66.  
Salk. 636 640.  
1. Com. Dig. 131.  
5. Com. Dig. 351.  
4. Bac. Ab. 13.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

## Symonds against Seabourne.

CASE 8.

Easter Term, 8. Car. 1. Roll

ACTION ON THE CASE. Whereas the plaintiff, upon 9th October, 5. Car. 1. was possessed of an ancient house in Worcester; and the defendant, the 9th October, 5. Car. 1. was and yet is possessed of another house and void piece of land adjoining to the north part of the plaintiff's house, wherein were three windows, time whereof memory, &c. by which windows the light came out of the said void parcel of land into the plaintiff's house, time whereof, &c.: that the said defendant maliciously, to deprive him of the light coming by the said windows into his house, the said 9th October, 5. Car. 1. erected a building in part of the said void piece; and thereby stopped the lights coming by the said windows into his house, whereby his house is totally darkened, and he much prejudiced by that stopping. The defendant pleaded not guilty; and found against him.

Exception was taken in arrest of judgment, That the declaration was repugnant in itself; for to say *ad hoc possessionatus* of the said void piece of land, and to shew the offence in erecting a building upon it, shews that it is not now a void piece of land.

BERKLEY was of this opinion; but RICHARDSON, JONES, and MYSELF held, that this is good enough, and no repugnancy in the *ad hoc possessionatus*; for it may be that part of the said void parcel of land is builded, and darkens his light, and part remains still void;

220. CAR.

Y

and

An action on the case may be maintained by a lessee for years for obstructing the lights of an ancient messuage.

Cro. Eliz. 143.  
1. Sid. 167.  
Cro. Jac. 373.  
1. Vent. 237.  
1. Show. 7.  
1. Id. Ray 392.  
4. Burr. 2141.  
Cowp. 636.

A declaration that the defendant was and yet is possessed of a house and a void piece of land, and erected buildings thereon, &c. is good. Dougl. 455.

SYMONDS  
against  
SEABOURNE.

A prescription  
for ancient  
lights is to the  
house and not  
the person.  
Post. 419.  
Cro. Jac. 152.  
373.

and the declaration as to that is but surplufage, and the one part well stands with the other.

ANOTHER EXCEPTION, Because he alledgeth not any person in whom the prescription may be fixed; and the plaintiff is but lessee for years, who cannot prescribe. But it was answered thereto, that the "time whereof, &c." is tied to the house, and not to any personal prescription; and being an ancient house and windows therein, time whereof, &c. there need not any prescription in any person.—Wherefore it was adjudged for the plaintiff.

## CASE 9.

Baal against Baggerley.

Trinity Term, 9. Car. 1. Roll .

To say, "Thou  
"hast forged a  
"privy seal, and  
"a commis-  
"sion," shall  
be intended to  
mean "The  
"king's privy  
"seal," and  
"the king's com-  
"mission under his  
"privy seal."

**A**CTION FOR WORDS: "Thou hast forged a privy seal  
"and a commission: Why dost not thou break open thy com-  
mission?"

After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that these words are not actionable: for he did not say *the king's privy seal*, nor any writ under *the* privy seal; and it doth not appear what privy seal he intended: also, he saith not what commission; and the words subsequent, "thy commission," shewed that he intended a commission made by the plaintiff himself.

S C. Jones, 325.  
1. Roll. Ab. 68.  
2. Bulst. 137.  
1. Lev. 138.  
1. Sid. 142.  
1. Hawk. P. C.  
338.

But it was answered thereto, that by a *privy seal* is intended *the king's privy seal*, and being spoken generally, is to be intended according to the vulgar speech and intendment; and no other seal is meant thereby besides the king's: and "thy commission" is intended a commission which is sued out under the privy seal.

THE COURT seemed to incline to this opinion; but BERKLEY, Justice, doubting thereof, the Court would advise.

Afterward it was moved again and argued by PALMER, for the defendant, and by CALTHROP, for the plaintiff.

PALMER shewed, that these words do not import in themselves that he spake of the king's privy seal, for there is not any inducement that there was any speech of the king's privy seal; and the words in themselves do not import any slander, and they shall not be helped by an intendment or innuendo. And it may be, that a private person might have a private seal; and the words after shew the intent of the defendant; when he said "thy commission," innuendo the commission of the plaintiff.

CALTHROP thereto answered for the plaintiff, that the words shall be taken according to the vulgar opinion, and as the auditors understand in their usual phrase, which is, that he spake of "the king's privy seal," when he said "a privy seal;" and when he said "thy commission," it is to be intended "the commission under the privy seal which the plaintiff sued out." And he cited a case in *Trinity Term*, 35. Eliz. (a) where an action was brought for these words, "Thou hast forged a writing for which thou wast brought into the star-chamber;" and it was adjudged in the common pleas that the action lies, for they shall be intended such writings for which one shall be punished.

(a) Munday v. Cordal, Cro. Eliz. 196.

And



And ALL THE COURT *seriatim* delivered their opinions, that the action well lies; for the words are spoken maliciously; and being alledged in the declaration that he spake them to scandalize him for forging of the privy seal and a commission, and being found guilty, it shall be intended according to the vulgar interpretation, "*the king's privy seal*," the counterfeiting whereof is treason (a); and a commission shall be intended *the king's commission under his privy seal*.—BERKLEY, Justice, agreed with the others. And judgment was given for the plaintiff.

BAL  
against  
BAGGERLEY.

1. Roll. 68.

(a) By 25. Edw. 3. c. 2. and 1. Mary, st. 2. c. 6.

### Johnson against Davy.

CASE 10.

Trinity Term, 9. Car. 1. Roll 1314.

**EJECTMENT** of six messuages, one hundred acres of land, three hundred acres of pasture, &c. Upon not guilty pleaded, the verdict was found for the plaintiff.

GRIMSTON moved in arrest of judgment, that this suit is by original writ, and the original doth not warrant the declaration; for the original is of one messuage and sixty acres of land, and so varies from the original in the number of the messuages and the land.

But ROLLE, for the plaintiff, said, that this shall not be intended the original upon which the plaintiff declared; but that there was another original which warrants this declaration, which is now embezzled. And it shall not be intended to be grounded upon the writ which is now shewn, FIRST, Because the writ bears *teste* 18th April, returnable 15. Pascha, and this declaration is in Trinity Term, and here is no continuance upon this writ: SECONDLY, Because the writ is against this defendant and a copyholder: and in this declaration there is no name of the copyholder; wherefore it shall be intended that this declaration is grounded upon another writ now wanting; and this want is aided by the statute of *Jeofails*.

And ALL THE COURT, *absente* RICHARDSON, was of the same opinion; and rule given for judgment for the plaintiff.

In ejectment, if the original writ appear to be of another Term, and between other parties than those in the declaration, it shall be intended not the writ on which the plaintiff declared. Ante, 281. 290. 291. Hob. 251. 3. Mod. 136. Cro. Jac. 655. 647. 4. Mod. 246. Barnes, 415. 1. Com. Dig. 320. 1. Bac. Ab. 92. in *notis* Cowp. 455.

### Penfon against Gooday.

CASE 11.

Trinity Term, 9. Car. 1.

**ACTION ON THE CASE.** That the defendant maliciously and falsely, to deprive him of his life, spake these words of the plaintiff: "Thou hast taken out of my pocket forty pounds of my money, and I will cause thee to be indicted at the sessions of the peace, and to hold up thy hand at the bar for it." *Et ex ulteriori malitia* against the plaintiff at such a day after, said, "He hath picked out of my pocket silver and gold." After not guilty pleaded, and found for the plaintiff,

GRIMSTON moved in arrest of judgment, that these words are not actionable, especially the last words; and being spoken at several times, and there lying no action for the last words, and damages entire given, the plaintiff ought not to have judgment: and to prove that he cited the case of *Osborn v. Middleton* (a).

Words spoken at different times, if some be actionable and others not, and entire damages given, no judgment can be entered; *sed aliter* if the words be spoken at the same time, though some may not be actionable. Ante, 327.

(a) 10. Co. 132. a.

PENSON  
against  
GOODAY.

Cro. Jac. 115.  
143.  
Cro. Eliz. 788.  
1. Roll. Ab. 576.  
Moor, 142. 708.  
10. Co. 131.  
Hutt. 13.  
2. Bac. Ab. 7.  
2. Com. Dig.  
624, 625.  
Dougl. 377-730.  
2. Term Rep.  
433.

And THE WHOLE COURT was of the same opinion, that if the words spoken at any of the times will not bear an action, and entire damages be given, there shall no judgment be entered: and therefore the difference is, when the words are all spoken at one time, and part of them are actionable and part not, there damages shall be intended to be given only for those words which are actionable; but where words are spoken at several times, and the first are actionable, and the other not, and the defendant found guilty of both, and entire damages given, there no judgment shall be entered. But in this case the first words without question are actionable; for he directly charges him with a felonious taking, when he said, "He would cause him to be indicted, and to hold up his hand for that cause." And they also held, that the last words being alledged to be spoken *ex ulteriori invidia et malitia* have reference to the first, which is the picking of the pocket before mentioned, and so charging him with that felony. It was therefore adjudged for the plaintiff.

## CASE 12.

Vesey against Harris and his Wife.

Hilary Term, 7. Car. 1. Roll

*Seire facias* for restitution of money recovered on a judgment which was afterwards reversed. Plea of payment, *absque hoc*, that he is *adhuc possessionatus*, &c. The traverse is on an immaterial point, and bad. S. C. Jones, 326. 4. Leon. 194. Clift. 675. 1. Vent. 211. 217. Cro. Jac. 29. Lut. 328. 382. 3. Lev. 228. Cro. Eliz. 555. 1. Saund. 268. Strange, 694. 1. Cramp. Prac. 364. 4. Bac. Ab. 76. Cowp. 728. 2. Term Rep. 45.

**SCIRE FACIAS.** Whereas the wife *dum sola fuit* recovered in the king's bench, in an action on the case, 26l. 13s. 4d. for damages and costs, and had execution of those damages, and yet is thereof possessed; and whereas afterwards the said judgment was by a writ of error removed into the exchequer chamber, and there reversed and restitution awarded; and afterward she took the said *Harris* to husband; the plaintiff thereupon brought this writ to have restitution.

The defendant pleaded, that after the reversal had, and before the purchase of this writ, he paid to the plaintiff the said debt and costs of 26l. 13s. 4d. *ABSQUE HOC*, that they be *possessionati* of the said money *prout*.

The plaintiff hereupon demurred, because the plea and traverse are both ill.

And now it was argued at the bar by *CALTHROP*, for the plaintiff, and by *GERMYN*, for the defendant.

*RICHARDSON*, Chief Justice, *JONES*, and *MYSELF* held, that the pleading of the payment is ill, because it is grounded and affirmed against the record; and a payment being against matter of record, cannot be a discharge unless by matter of record: and as in a *seire facias* to have execution payment is no plea in discharge thereof, no more is it in a *seire facias* to have restitution. And it appears by THE YEAR-BOOK 20. *Hen. 6. pl. 24.* and 21. *Hen. 6. pl. 15.* that it is much doubted whether if "levied by the sheriff upon a *seire facias*" be good plea; and at length it was ruled to be good, because it is grounded upon the *seire facias* awarded, which he cannot withstand; and in reason therefore it should then be allowed (a) *à multo fortiori*, a bare payment is no plea: and if it be a plea, yet as it is pleaded, it is not good; for he doth not rely upon it, but traverseth that which is immaterial (a), *viz. absque hoc*, that he is *possessionatus*, &c. which was idly alledged, and not material or traversable; and by his traverse he waives his pleading of the payment.

(a) By 4. & 5. Ann. c. 16. no exception shall be taken to an immaterial traverse unless shewn for cause of demurrer.

which being specially shewn for cause of demurrer, the demurrer is good, and judgment shall be against the defendant.

BERKLEY, Justice, held, that payment had been a good plea, if he had relied thereupon, because he avers that thereby the party is satisfied: and in divers cases matter in fact may be pleaded in discharge; as in debt upon an escape, he may plead, that the plaintiff commanded him to let him out of execution, and such like, &c. But as to the traverse, he conceived it ill, and therefore agreed with the other Justices, that judgment should be given for the plaintiff; and it was adjudged accordingly.

VERBY  
against  
HARRIS and his  
WIFE.

Penfon and Anne his Wife against Gooday.

CASE 12.

Trinity Term, 9. Car. 1. Roll

**ACTION ON THE CASE.** Whereas he keepeth an alehouse, being *debito modo licentiatum* by justices of the peace; that the defendant, to scandalize the plaintiff's wife, spake these words of her: "Hang thee, bawd," *innuendo* the said wife; "thou," the said Anne *innuendo*, "art worse than a bawd; thou keepest an house," *messuagium prædictum innuendo*, "worse than a bawdy-house; and" "thou keepest a whore in thy house to pull out my throat." Upon not guilty pleaded, it was found for the plaintiff.

STONE moved in arrest of judgment, that these words are not actionable; but agreed, that for saying one is "bawd, and keeps a bawdy-house," action lies, because it is a temporal offence, for which the common law inflicts punishment: but to call one "bawd" without further speaking, an action lies not, no more than to call one "whore," which is a defamation only punishable in the spiritual court: and to say, that "he keeps a house worse than a bawdy-house," hath not any plain intendment what he meant thereby; wherefore the action lies not: and if it be intended that such words should hinder guests from coming hither, being an alehouse, the husband only ought to have brought the action.

And as to that THE COURT, *absente* RICHARDSON, agreed: but for the other words they held, that the action lies by the husband and wife for the slander to his wife; and it is as much as if he had said, that she keepeth a bawdy-house. Wherefore it was adjudged for the plaintiff.

An action lies by husband and wife for saying of the wife, "Hang thee, bawd; thou art worse than a bawd; thou keepest a house worse than a bawdy-house; and thou keepest a whore in thy house to pull out my throat." Ante, 229. Post. 394. 1. Roll. Ab. 68. Cro Jac. 462. 1. Mod. 31. 1. Sid. 438. 1. Vent. 53. 2. Keb. 589. Cro. Eliz. 229. 251. 1. Ld Ray. 710. 2. Ld Ray. 1004. 2. Stra. 1169. 1. Hawk. P. C. 357.

George Minn against Anthony Hynton, Bailiff of the Liberty of the Dean and Chapter of Westminster.

CASE 14.

In Chancery.

**THE** plaintiff declares as clerk of the hamper in an action upon the case. Whereas one Robert Treswell, 16th February, 4. Car. 1. was bound to him in an obligation of 100l. which was not paid; and whereas he, for the obtaining of the said debt, 12th March 5. Car. 1. being clerk of the hamper in chancery, prosecuted an attachment of privilege, directed to the sheriff of Middlesex, to attach his body, returnable 15. Pasch. in chanbery, *ad respond.* the said GEORGE MINN in *placito transgressionis*, which writ he prosecuted

An officer of the court of chancery cannot hold a person to bail on an attachment of privilege in trespass, with an intention to declare against him in debt.

See Tidd 193. 3. Term Rep. 662.



MINN  
against  
HYNTON.

*ea intentione*, that the said Robert Treswell so being arrested upon his appearance, should put in good bail to answer him to his said bail by him to be put in for the recovery of his said debt upon the said obligation; which writ afterward, viz. 13th March, 5. Car. 1. was delivered to the sheriffs of *Middlesex* to execute; and that they the same day directed their warrants under their seals to the bailiff of the liberty of the dean and chapter of *Westminster* to arrest him; which warrant, 14th March, 5. Car. 1. was delivered to the defendant, bailiff of the said liberty, to execute; and that he, by virtue of the said warrant at *Westminster*, within the said liberty, upon the 25th March, 5. Car. 1. arrested the said Robert Treswell, and had him in his custody; and that afterwards, before the return of the writ, viz. 8th April, 6. Car. 1. to delay the plaintiff of his suit, and to defraud him of the recovery of his debt, let him out of his custody, and to go at large against the plaintiff's will, and had not his body at the day; and that afterward *se eloinera*; and because he is delayed in his suit and loseth his debt, &c.

The defendant pleads thereto, that the said Robert Treswell found sureties for his appearance Arthur Squibb and J. W.; and at the day of the return of the writ the defendant returned "*cepi corpus*;" and that before the *habeas corpus* to bring him to the bar, he the said Robert Treswell died. *Et hoc, &c.* The plaintiff replies, that he did not take the said Arthur Squibb and J. W. sureties for his appearance *modo et formâ*: and hereupon it was demurred.

And this was referred to JUSTICE JONES, JUSTICE BERKLEY, and to MYSELF, to consider of this demurrer; and after argument, by counsel on both sides, we resolved, that this declaration was not good.

An action  
against a bailiff  
for an escape  
must shew of  
what liberty he  
was bailiff, and  
that he had the  
execution of  
writs

2 Term Rep. 5.

In the king's  
bench, when de-  
fendant is com-  
mitted to the  
marshal, or has  
put in bail, the  
plaintiff or any  
other may de-  
clare against  
him in whatever  
action he pleases.

2. Inst. 23.

4. Inst. 7.

2. Bull. 207.

Com. 285.

But

FIRST, Because he doth not say of what liberty he is bailiff, or whether he hath execution and return of writs; otherwise there is no colour to charge him, and therefore ought to be specially shewn. And of this opinion was JONES; and I agreed with him: but BERKLEY doubted thereof, because being bailiff of a liberty, it cannot be intended another liberty; and he admits it in his plea, by making him a warrant to arrest.

SECONDLY, Because he alledges that he had an attachment of privilege to arrest him for trespass, intending after his appearance to declare in debt; which cannot be: for it is abusing the process of the court; nor can it be so in any court but in the king's bench; and there the reason is, because when he appears and puts in bail, he is supposed to be in *custodiâ marescalli*, and declares against him in *custodiâ, &c.*; but so it is not in any other court (a).—Wherefore THEY ALL AGREED, that the declaration for this cause was not good, and that judgment ought to be against the plaintiff: and so we certified that the declaration was ill, and the causes wherefore.

Hob. 267. Cro. Jac. 450. 620. Godb. 339. 1. Salk. 352. Cowp. 455. 3. El. Com. 285. But see Tidd's Practice, 186. 193.

#### CASE 15.

#### Bawderock against Mackaller.

Information qui  
turn for more  
than the penalty,  
or after the time  
limited, though

INFORMATION, upon the 31. Eliz. c. 6. of simony, for the king and himself; supposing the church in the Tower of London to be a benefice with cure of the annual value of 6l. 13s. 4d. granted bad for the informer, is good for the king.

abl

able by the king, and that one SUCH was parson, and resigned; and that afterwards the defendant agreed with J. S. to give him twenty pounds if he might procure him to be presented thereto by the king, and admitted and inducted: and alledges in fact, that he procured the king to give unto him the said presentation to the said chapel, and that he was admitted, instituted, and inducted thereto; and therefore he demanded 6l. 13s. 4d. being the double value, *secundum formam statuti*, &c. Upon not guilty pleaded, and found for the plaintiff,

HENDEN, *Serjeant*, moved in arrest of judgment: FIRST, That this information is not good, because he shews the annual value to be 6l. 13s. 4d. and the statute is that he shall forfeit a double value, and yet demands 6l. 13s. 4d. as being the double value; whereas it appears it is not, and therefore it is ill.—*Sed non allocatur*: for the truth of the offence being shewn, and found against him, although he demands less than he ought, yet the information is good for the king: and it was compared to the case of *Agard v. Candish (a)*, which was adjudged in the exchequer, where an information was brought for him and the king upon the statute of liveries; and it was brought after the year, which is not good for the party, by the express words of the statute, yet it was good for the king, and judgment entered.

SECONDLY, It was moved, that this being a donative of the king's donation, is not within the statute of 31. *Eliz.* c. 6. for that mentions only where one comes in by simony, by presentation, or collation, &c.—*Sed non allocatur*; because it is within an equal mischief, against which the statute provides, and so within the remainder thereof.

simony may be committed without the patron's privity.

THIRDLY, It was objected, that this could not be within the statute, because the king being donor, it cannot be intended that he presented for simony; and the statute is, that the patron shall lose his presentation for that time, and the king is to have it; therefore it shall not extend to any of the king's donations.—*Sed non allocatur*: for simony may be by compact betwixt strangers, without the privity of the incumbent or patron, and yet within the purview of the statute; as it was adjudged in *Calver's Case* in the exchequer, as JONES cited it, where the father of the incumbent contracted with the patron's wife, to give her one hundred pounds if the patron would present his son, the patron or incumbent not knowing of this contract (as it was found by special verdict); yet this was held to be within the statute: so here, he giving to a stranger 26l. &c. is within the statute. Whereupon rule was given, that judgment should be entered for the plaintiff.

See 12. Ann. c. 12.

### Chedley's Case.

Case 16.

CHEDLEY being indicted in the grand sessions at *Anglesea* in *Wales*, for petty treason, a *certiorari* was prayed to remove the indictment, and have it tried in an adjoining county; and THE COURT being moved concerning their opinions how it might be

tried

BAWDEROK  
against  
MACKALLER.

Cro. Jac. 365.

499.

And. 127.

Moor, 564.

Cro. Eliz. 583.

11. Co. 66.

2. Mod. 267.

2. Bl. Rep. 791.

2. Hawk. P. C.

380. 386.

4. Bl. Com. 62.

(a) 2. Danv.

283.

Cro. Eliz. 326.

Moor, 564.

2. And. 127.

Sav. 134.

A donative is within the 31. *Eliz.* c. 16. against simony, although in the king's gift, and he present the incumbent; for 3. Com. Dig. 126.

A corrupt contract for procuring a presentation to a benefice, although neither patron nor incumbent be privy to it, is simony. Post. 425.

Cro. Jac. 385.

533.

3. Lev. 357.

3. Lev. 337.

Lane, 73.

Cro. Eliz. 788.

A *certiorari* is grantable to the grand sessions in *Wales*, to remove an indictment of petty treason. Roll. Ab. 394.

CHEDLEY'S  
CASE.

1. Hale, 158.  
Cro. Jac. 484.  
8. Mod. 135.  
1. Salk. 146.  
Strange, 104.  
553. 704.  
Wilson, 320.  
Atk. 175. 182.  
Cowper, 751.  
2. Burr. 835.  
3. Tr. Rep. 658.

tried in any other county, doubted thereof: but it appears by divers precedents, that a *certiorari* hath been awarded in such cases into *Wales*, by reason of the statute of 26. Hen. 8. c. 6. which allows that indictments in cases of felony may be enquired in the adjoining counties. And JONES said, that in 32. Eliz. such a *certiorari* was granted upon debate. Wherefore the Court awarded a *certiorari*: and they said, when the record was removed they would advise how it should be tried. But afterwards it was stayed, and appointed to be argued, whether a *certiorari* were gaantable.

4. Burr. 2457. Douglas, 751. 2. Hawk. P. C. ch. 27. f. 25. 5. Com. Dig. 666.

## CASE 17.

## Martyn Page's Case.

Penetration must be proved on an indictment for a rape; and on acquittal for this defect, the offender may be indicted for the misdemeanour.

1. Hawk. P. C. 170.  
2. Hawk. P. C. 625.  
3. Burr. 1696.

MARTYN PAGE was indicted at *Newgate* sessions, for that carnaliter cognovit one A. W. an infant under the age of ten years (a); and because upon evidence to the jury at his arraignment it was not proved that he entered into the child's body (but the contrary), although he very much had abused her, the jury would not find him guilty of the felony: whereupon, by advice of JUSTICE JONES and JUSTICE BERKLEY, who heard the evidence, and conceived it a foul fact, and fit to be punished, an indictment of battery for abusing the said infant in lying with her was preferred and found; and he was thereupon tried this Term at the bar, and being found guilty, was adjudged for the misdemeanour to be committed to prison, there to abide during the king's pleasure, to be fined two hundred marks, to stand upon the pillory in *Chancery-lane*, in *Middlesex*, near the place where the fact was committed, with a paper upon his head signifying the cause, and to be bound with able sureties to the good behaviour during life.

(a) See 18. Eliz. c. 7.

## CASE 18.

## Arthur Crohagan's Case.

Threatening to "kill the king," provided the person afterwards come to England for that purpose, is an overt act of treason within 25. Edw. 3. c. 2. Ante, 125. Dyer, 98. 3. Inst. 11. Co. Lit. 261. b. 1. Hale, 116. Kely 13. 4. St. Tr. 645. Foster, 292.

ARTHUR CROHAGAN, an *Irishman*, was arraigned the same day, viz. 25th November, of treason, for that he being the king's subject, upon the ninth of July, 7. Car. 1. regis nunc, at *Lisbon*, in *Spain*, used these words: "I will kill the king" (*innuendo dominum Carolum regem Angliæ*) "if I may come to him;" and that in August, 9. Car. 1. he came into *England* for the same purpose.

To this he pleaded not guilty, and was tried by a jury of *Middlesex*; and it was directly proved by *Wheeler* and *Elesley*, two merchants, that he spake those words on shipboard at *Lisbon*, in *Spain*, in great heat of speech with *Captain Bask*, and added these words, "because he is an heretic."

And for that his traitorous intent and the imagination of his heart is declared by these words, IT WAS HELD high-treason by the course of the common law, and within the express words of the statute of 25. Edw. 3. c. 2.

And he coming into *England* in August last, and being arrested by a warrant for this cause, most insolently put his finger into his mouth, and scornfully pulling it out, said, "I care not this for your king, &c.;" all which speeches and actions, though he now denied them, yet the jury found him guilty: whereupon he had judgment accordingly. He confessed that he was a Dominican friar, and made priest in *Spain*; and although this, and his returning into *England*



England to seduce the liege people, were treason by the statute of 23. Eliz. c. . yet the king's attorney said, he would not proceed against him for that cause, but upon the statute of 25. Edw. 3. c. 2. of treason.

CROWHAN'S  
CASE.

Thomas Adams against Lord Warden of the Stanneries.

CASE 19.

THOMAS ADAMS, by Nov, the king's attorney, prayed a prohibition against *The Lord Warden of the Stanneries in Cornwall*, and his deputy there, and against *Richard Adams* and others, for that they procured an order and decree for the payment of a sum of money unto them, without any bill and summoning the defendant to appear, and without any answer or sentence of Court; so the proceedings were *coram non judice*. And Nov said, all their proceedings there summarily, *et de plano*, without any formal course, were illegal, and the king's courts shall take notice where they proceeded irregularly, and shall controul them, and preserve the jurisdiction of the court: and he further said, that the jurisdiction of the stanneries (a) is only for tin matters, and where the persons which sue, or the one of them, be a tinner (b).—Whereupon a prohibition, comprising all this matter, was drawn and granted accordingly.

A prohibition granted to the Stanneries, on a suggestion that their proceedings were repugnant to the rules of justice, 4. Inst. 229. 231. Roll Ab 547. 12. Co. 10. 3. Bull. 283. 2. Roll Rep. 579. 1. Bac. Ab 652. Cowp. 424.

(a) Vide 16. Car. 1. c. 15. which declares their privileges; and a treatise on their laws, published by authority at Truro, 13th September, 27. Geo. 2. 1. vol. 8vo.

(b) 7. Mod. 103. 2. Vern. 483.

Swayn against Stephens.

CASE 20.

*Ante, Page 245.*

THIS Case was now moved by CALTHROP, for the plaintiff, (none being there for the defendant). FIRST, That an action of trover is not within the statute of limitations of 21. Jac. 1. c. 16.—But ALL THE COURT *una voce* over-ruled it: for although it be not particularly mentioned in the clause of limitations, yet it is under the general words of actions upon the case; and it appears expressly, that it is so intended by the last proviso in the statute, wherein action of trover is especially mentioned.

Trover is within the statute of limitations 2. Saund. 120. 2. Mod. 71. Stra. 556. 1271. 3. Bac. Ab. 515.

A SECOND QUESTION was, The defendant being beyond seas at the time when the statute was made, and until *prima Cironi*, Whether the plaintiff is to be relieved by the equity of the statute, although he be not within the express words of the last proviso? for that provides only where the plaintiff is over the sea, to have his action when he returns, if he brings his action within the year after his return; but there is no mention, when the defendant is over the seas, of enlarging the time (a). And it was strongly urged

The exception in the 21. Jac. 1. c. 16. as to persons being beyond seas, extends only to creditors, and not to debtors. 1. Lev. 143. 3. Mod. 312. Prec. Cha. 385.

(a) But now by 4. Ann. c. 16. if any person against whom an action lies by 21. Jac. 1. c. 16. was beyond sea at the time that the cause of such action accrued, the plaintiff may bring his action within the same time after his return as is limited for such action by the 21. Jac. 1. c. 16.

by

SWAYN  
against  
STEPHENS.

Ante, 246.

by GRIMSTON, for the plaintiff, that he is within the equity of the said proviso; for it would be *inutilis et stultus labor* to sue one to outlawry being beyond seas, when it is erroneous and reverfable at his return.—JONES and BERKLEY, *Justices*, were of that opinion, that the defendant being beyond sea, is within the equity and intention of the statute, as well as where the plaintiff is beyond seas.—RICHARDSON, *Chief Justice*, doubted thereof, and said, that he would not deliver any opinion: but I conceived, that the defendant being beyond seas, is not within the equity of the statute; for the statute provided remedy where the plaintiff is over seas, and omitting where the defendant, &c. did it purposely, and never intended to provide any remedy for him, because the plaintiff may prosecute his suit by original, although the defendant be beyond seas, unto an outlawry; which will shew there was not any remissness in him, which is the matter which the law intends, and that there should be a fresh prosecution: and when the defendant reverseth the outlawry, the plaintiff shall then know where he is to prosecute the suit against him; so the first original is not merely a fruitless and idle labour, but thereby preserves his action.

A replication  
varying from  
the count upon  
any immaterial  
point is no de-  
parture.

Ante, 76. 246.  
257.

1. Lev. 110. 143.  
Strange, 2. 806.  
Fort. 375.  
5. Com. Dig.  
99. 102.

THIRDLY, For the departure from the declaration, &c. RICHARDSON, JONES, and BERKLEY, held, that the replication is no departure, but is pursuant to the count, and fortifies it; but I conceived it was a departure, because it varies in the matter and in the time; for the declaration supposeth a possession of the goods, and that 1st March, 21. Jac. 1. he lost them, and the same day the defendant found them, and the 1st October, 3. Car. 1. converted them: and the plaintiff in his replication shews, that he, the said 1st March, 19. Jac. 1. delivered them to the defendant to transport unto T. in Spain, and to re-deliver them upon request; and after shews, that the defendant, 21st March, 19. Jac. 1. at St. T. sold and converted them to his own use; so it varies in the point how the goods came to the defendant's hands, both for the matter and time.

In trover for a  
ship and goods,  
if it be alledged  
that the plaintiff  
sold them beyond  
sea; that he re-  
turned on such  
a day; and that  
after, on demand  
made, he refused  
to deliver them,  
it shall be in-  
tended that they  
came a second  
time to the de-  
fendant's hands.

2. Term Rep.  
462.

FOURTHLY, They held, when it is alledged that the defendant returned from beyond seas 1. Car. 1. and that the plaintiff 3. Car. 1. required the re-delivery, and he refused; and afterward, the same 1st October, 3. Car. 1. converted them to his proper use; it shall be intended, that the said goods came a second time to the defendant's hands; and that they being in his hands, the plaintiff required the delivery of them; and that afterwards the same day he converted them, and that upon this conversion the plaintiff had grounded his action, and the plaintiff had election upon which conversion he would bring his action; and then he is clearly out of the said statute of 21. Jac. 1. c. . the action being brought within two years after the last conversion, and so well brought. But I doubted how this action should be maintained, without shewing how they came to the defendant's hands, where it is allowed, that once he sold them in 19. Jac. 1. and converted the money to his proper use; and the allegation, that he after refused to deliver, and converted them to his proper use, without shewing how he came to them, cannot be good. But THE OTHER THREE JUSTICES being against me, they gave rule, that judgment should be entered for the plaintiff, unless, &c.

Dike against Ricks.

CASE 21.

Hilary Term, 8. Car. 1. Roll 704.

**R**EPLEVIN. The defendant avows, for that the place WHERE, If *A. devises* &c. is fourteen acres of land in Edmonton, whereof *diu ante*, land to *B. his* &c. one *Ferome Sugar* was seised in fee, and held them in socage, wife for life, and devised them to *Elizabeth* his wife for her life, and died; that the and also wills, reversion descended to *Ferome Sugar* his son and heir, and he died that if it shall appear that seised of the reversion, which descended to *Anne* his sister, wife of there are not the said *Ricks*; that the said *Elizabeth* died, and the said *William Ricks* sufficient assets to pay his debts, and *Anne* entered, and by the indenture let those lands to *John Fenn* that then *B.* for one-and-twenty years, rendering ten pounds yearly rent, and he shall have power to sell so much of the land as will pay the debts, *B. may* entered: and for the rent of half-a-year, due at the *Annunciation* last immediately sell so much of the land as is necessary for the purpose; for this is a condition precedent. past, he avows. The plaintiff, in bar to this avowry, confesseth the seisin of *Ferome Sugar* the father, and the tenure and devise to *Elizabeth* for her life, prout, &c. but he further saith, that he by the said will appointed the said *Elizabeth* his executrix; and further devised and appointed, that if in case it should fully and sufficiently appear, that the said *Elizabeth* should not find sufficient of the goods, chattels, and debts, due to the said *Ferome* the testator to satisfy his debts, and to maintain the said *Elizabeth* and her children, that then she should sell all the said tenement, or so much as, with his goods and debts owing him, would satisfy his debts and maintain her and her children: and he alledgeth, that in 43. *Eliz.* it sufficiently appeared to the said *Elizabeth*, that the said *Ferome* had not at the time of his death goods, chattels, and debts owing him sufficient to satisfy his the said *Ferome's* debts, and to maintain the said *Elizabeth* and her children; wherefore she, by indenture inrolled in chancery within six months, for 160l. bargained and sold the said tenement to *William Sugar* and his heirs, by virtue of which bargain and sale, and by the statute 27. *Hen. 8. c. 10. of Uses*, the said *William Sugar* was seised in fee, and afterward *Ferome* the son released unto him and his heirs, who by fine conveyed it to the plaintiff; and TRAVERSETH that the said *Ferome* the son died seised of the reversion. The avowant thereupon demurred:

S.C. Jones, 327.  
1. Roll. Ab. 329.  
415.  
Cro. Eliz. 219.  
Cowp. 43.

And now being argued at the bar by GRIMSTON, it was adjudged for the defendant, that the plea to the avowry was good:

FIRST, Because he doth not shew what was the value of the goods and debts due to the testator, and what was the sum of the debts which he owed, and what was the value of the lands sold, so as it might appear to the Court that she had cause of sale of the whole land, for she had authority only to sell as much as should suffice, &c.

SECONDLY, For that the will giving the authority to sell, and he pleading a sale by indenture of bargain and sale inrolled, and that by virtue thereof, and of the statute of 27. *Hen. 8. c. 10. of Uses*, he was seised of the reversion, &c. it is not good; for if the sale be good by the authority of the will, he is not in by the statute, but by the devise; and where it was said, that this sale shall be *quoad* the

If an inducement to a traverse shews a defective title, the inducement is bad.  
Post. 442.

Jones, 328. Yelv. 225. 1. Saund. 268. Salk. 520.

estate



**DIKE**  
**against**  
**Ricks.**

Co. Lit. 113. a.  
1. Roll. Ab. 329  
1. Burr. 1029.

A release to a  
lessee for years,  
without saying  
"to him and  
"his heirs,"  
doth not enlarge  
the estate.

Co. Lit. 273.

An inducement  
to a traverse  
must always be  
sufficient in  
substance.  
Ante, 266.  
Post. 442.

2. Leon. 32.

estate for life only which is transferred by the statute, and the reversion was conveyed by the will, it was held, that when she took upon her to sell, she sold the entire estate and inheritance of the land wherein the estate for life is contained, and she did not by authority of the will convey the reversion only expectant upon the estate for life. And JONES said, that in 22. Jac. 1. in *Davie v. Urber*, both these points were adjudged accordingly.

THIRDLY, It was held, that the pleading of the release is to no purpose, because although the release be by him and his heirs, yet it is not a release to him and his heirs; and when by the bargain and sale the estate for life of the lessee only passed, this release doth not enlarge it to increase the estate.

192. Jenk. 100. Jones, 318. Dyer, 265. Cowp. 599.

FOURTHLY, Where it was alledged, that this plea is an inducement to the traverse, and therefore not issuable, and then there needs not so much certainty as where the matter is issuable, yet THE COURT held, that the plea is not good; for an inducement to a traverse ought always to be sufficient in matter, which is not here. Wherefore it was adjudged for the avowant.

4. Bac. Ab. 68. 5. Com Dig 121.

CASE 22.

— against The Inhabitants of the Hundred of —.

A master may  
maintain an ac-  
tion in his own  
name on the  
statute of Hue  
and Cry for a  
robbery com-  
mitted on his  
servant, and the  
servant shall be  
sworn.

Ante, 38. 256.

3. Cro. 142.

Hob. 327.

In an action  
qui tam on the  
statute HUE  
AND CRY, the  
qui tam pro do-  
mino rege need  
not be menti-  
oned in either  
the issue or venire  
facias; for the  
king is only to  
have his fine.

Ante, 11. 256.

3. Lev. 375.

1. Com Dig.

220.

Co. Ent. 160.

348.

2. Hawk. P. C. 395.

ERROR of a judgment in the common pleas in an action on the statute of *Winton* of HUE AND CRY.

The error assigned was, Because the master brought the action for a robbery committed upon his servant, and the servant was sworn WHERE, &c.

CALTHROP objected, that the master who had the loss ought to be sworn.

GRIMSTON thereto answered, that the servant ought to be sworn and not the master; for although the loss is to the master when a servant is robbed of his money, yet the servant, upon whom the robbery was committed, is the proper person to be sworn that he was robbed, and that he knew not any of the robbers.

THE SECOND ERROR insisted upon was, Because the action is brought by the party and the king, yet neither upon the joining issue nor in the *venire facias* is there any mention of QUI TAM pro domino rege, &c. but of the party himself only.—*Sed non allocatur*: for it was said, that true it is, when the action is brought upon a penal statute, where part is given to the king and part to the party prosecuting, there it ought to be so, and it is the common course to enter the party QUI TAM pro, &c. But when the king is only named as an offence against the king and the party, and the king is not to have any part of the sum recovered, but only to have a fine, there neither in the issue nor in the *venire facias* is any mention of QUI TAM, &c. and so are all the precedents, as KEELING affirmed.

And ALL THE COURT was of that opinion; whereupon rule was given, that judgment should be affirmed.

Anonymous.

## Anonymous.

## CASE 32.

**A**CTION UPON THE CASE, for these words: "Thou hast given J. S. nine pounds for forswearing himself in chancery, and hast hired him to forge a bond." After verdict upon not guilty pleaded, and found for the plaintiff,

MALLET, the Queen's Solicitor, and HOLBOURN, moved in arrest of judgment, that these words are not actionable; for it is not alleged (as to the first words), that any suit was in the chancery, or that he forswore himself in his answer, or as a witness. Nor doth he say that he suborned him to forswear, nor that he gave that unto him to forswear himself, nor that he knew that he forswore himself, nor doth shew any particular wherein he forswore himself. And to say, that he gave unto him nine pounds for forswearing himself, may be intended, that he was enforced to pay it by reason of his false oath.

It is actionable to accuse a man of having paid money to another as hire to forswear himself in chancery; and it is not necessary to state that he did forswear himself.

Ante, 140. 322.  
Cro. Jac. 158.  
1. Hawk. P. C. 325.

*Sed non allocatur*: for the words are to be intended according to the usual manner of speaking, that he hired him to forswear himself: and although he doth not shew that he was sworn in chancery, nor what he swore, it is not material; for if he never was sworn, it is scandalous unto him to say, "that he procured one to forswear himself in a court of record," although it is merely false because he never was sworn. **SECONDLY**, To the words, that "he had hired him to forge a bond," although it is not said that he hath forged a bond, or that it appears he hath done the act, it is scandalous. And so held **ALL THE COURT**; wherefore it was adjudged for the plaintiff.

## Mackaller against Todderick.

## CASE 24.

**E**RROR of a judgment in the court of the Tower of London in *Assumpsit*, where the plaintiff declared, that the defendant promised him, in consideration that he would procure the said Mackaller to be presented and instituted to the chapel of the Tower, being a donative in the king's gift, &c. to pay to him twenty pounds upon request. The plaintiff alledgeth in fact, that by his labour and means the king presented the said Mackaller to the said chapel, and he was admitted, instituted, and inducted into it; and that he required the payment of the said twenty pounds at such a day, &c. and the defendant had not paid it. The defendant pleaded *non assumpsit*; and verdict and judgment for the plaintiff.

A promise to procure a person to be instituted to a chapel in consideration of twenty pounds is simoniacal and void. Post. 353. 361.  
1. Lutw. 346.  
1. Roll. Ab. 18.  
1. Bac. Ab. 18.  
Cowp. 39.

And now error brought. The error assigned, that judgment was given for the plaintiff, where it ought to be for the defendant.

FLETCHER, for the plaintiff in the writ of error, moved, that this judgment was erroneous, because he declares upon a promise grounded on a consideration against law, and that being the only consideration the *assumpsit* is void; and for that relied upon *Onely's Case*, 19. Eliz. *Dyer et 3. Co.—Et adjournatur (a)*.

(a) It was moved again in that the consideration was bad, and that the action would not lie; but the judgment was reversed for a fault in the

History and Easter Terms, and, after argument at the bar, **THE COURT** was of opinion, that the consideration was bad, and that the action would not lie; but the judgment was reversed for a fault in the declaration. Post 353. 361.

## CASE 23.

## Eliot against Skypp.

If the judge of  
assise remember  
that the verdict  
was contrary to  
the entry on the  
*possea*, it may  
be amended.

4. Co. 52. b.  
1. Roll. Ab. 701.  
Cro. Eliz. 112.  
150.  
Carth. 146.  
Cro. Jac. 185.  
Yelv. 186.  
1. Wils. 33.  
Stra. 1197.  
Salk. 47. 53.  
1. Burr. 383.  
1. Bac. Ab. 101.  
Bull. N.P. 320.  
Dougl. 376.  
730. 746.  
1. Term Rep.  
783.

**D**EBT for nineteen pounds ten shillings; and counts upon a lease for years of certain copyhold lands rendering eight-and-thirty pounds *per annum*, at *Michaelmas* and the *Annunciation*, by equal portions; and upon a lease of certain freehold lands in the said vill rendering twenty shillings *per annum* at the said Feasts: and for nineteen pounds for half a year of the said copyhold due at the *Annunciation* last, and for ten shillings for the freehold due at the same Feast, the action was brought.

The defendant pleaded *non debet*; and it was found for the plaintiff *quoad* the ten shillings for the freehold; and for the nineteen pounds *quoad* the copyhold rent it was found for the defendant.

The clerk of the assise returned the *possea*, that it was found for the plaintiff *quoad* ten shillings parcel of the said nineteen pounds ten shillings; *et quoad* the nineteen pounds residue of the said nineteen pounds ten shillings, that the defendant *non debet*.

And for this cause it was moved in arrest of judgment, that the verdict is incertain which of these rents was not paid.

But because that this issue was tried before JUSTICE BERKLEY, and he well remembered that the jury found for the copyhold rent for the defendant, and for the freehold rent for the plaintiff, therefore it was ordered, that the return of the *possea* should be amended accordingly, and that then the plaintiff should have his judgment.



## Hilary Term,

9. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

William Noy, *Esq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

### Memorandum.

CASE 1.

IN the vacation betwixt *Michaelmas* and *Hilary Terms* SIR JAMES WESTON, one of the Barons of the exchequer (who was a wise and learned man, and of courage), died at his chamber in the *Inner Temple*; and afterwards, in *Easter Term*, 10. Car. 1. RICHARD WESTON, of the same *Temple*, was made serjeant, and within four days sworn Baron of the exchequer.

The death of  
Baron *Weston*,  
Jones, 341.

### Dawes against Huddleston (a).

CASE 2.

CALTHROP prayed a prohibition against the parson of *W.* in the county of *Westmorland*, for suing for tithe of *trouts* taken in a river, because they be *feræ naturæ*; and shewed a precedent in *Easter Term*, 5. Car. 1. where a prohibition was granted against the same parson for suing for tithes of *eels* taken in the river, because they are *feræ naturæ*; and day was given to shew cause why it should not be granted.

Tithes are not  
payable for fish  
taken in rivers,  
except by cus-  
tom.  
Ante, 264.  
1. Roll. Ab. 635,  
636.  
1. Sid. 278.  
1. Lev. 179.  
Noy, 108.  
1. Vent. 5.  
Palm. 527.  
Heil. 13.  
Bunb. 43. 526.  
3. Com. Dig.  
101, 102. and  
see the case of  
Rex v. Carlyon,  
3. Term Rep.  
385.

And RICHARDSON, *Chief Justice*, said, that he knew where one suing for conies taken in *Methold Warren*, a prohibition was granted upon debate; and that in *Yarmouth* was a suit for tithes of herrings taken in the sea, but they could not prevail.

JONES said, that in his country of *Wales* they used to pay tithes for herrings; and in *Ireland* it is a common course to pay tithe of salmon taken in rivers.

RICHARDSON said, that, peradventure, may be by custom; otherwise tithes are not payable for fish taken in rivers.

(a) See 1. Roll. Ab. 635. b.

### Gobbet's Case.

CASE 3.

PROHIBITION was prayed by BULSTRODE for Gobbet, to stay a suit in the spiritual court for defamation in speaking these words, "He is a cuckoldly knave;" and cited precedents, that for saying, "he is a knave and a cheating knave," suit being in the spiritual court, prohibition was granted upon a good advisement. — And the Court said, that precedent is not like to this Case, for there was not any offence wherewith the spiritual court ought to meddle; but in this Case, for these words, it is properly to be examined and punished there *pro reformatione morum*; for it is a disgrace to the husband as well as to the wife, because he suffers and connives at it. Whereupon (*absente* RICHARDSON) it was denied to grant a prohibition.

"He is a cuck-  
oldly knave"  
are words pu-  
nishable in the  
ecclesiastical  
court.  
Ante, III. 229.  
2. Roll. Ab. 296.  
2. Salk. 692. 696.  
Stra. 471. 545.  
825. 1100.  
Ld. Ray. 1136.  
3. Lev. 137.  
Show. 337.  
Carth. 498.

4. Burr. 4031. Stra. 555. 8. Mod. 115. Lut. 1038. 1. Sid. 148. 4. Com. Dig. 508.

SECONDLY,

A prohibition will not lie for elting a man out of the diocese of London to the diocese of Canterbury. Ante, 97. 162 — Ray. 91. 2. Roll. Ab. 357. 446. Godb. 191. Cro. Jac. 321.

SECONDLY, it was moved, that this should be granted upon the statute of 23. Hen. 8. c. . because he was sued in the court of the arches, which is in the archbishop's jurisdiction, and the words were spoken at *Thistleworth*, in London diocese, as appeared by the libel (a).

Ante, 97. 162 — Ray. 91. 2. Roll. Ab. 357. 446. Godb. 191. Cro. (a) See Lutw. 1039. and Stra. 471. 555.

A suit for matters accruing in London may be either in the arches or in the consistory court; for the archbishops have remitted their courts to each other. Post. 456. — 13. Co. 4. Raym. 3. 1. Sid. 65. 1. Lev. 221.

But JONES said, that he was informed by DOCTOR DUCK, chancellor of London, that there hath been for a long time a composition betwixt the bishop of London and the archbishop of Canterbury, that if any suit be begun before the archbishop, it shall be always permitted by the bishop of London; so as it is *quasi* a general licence, and so not sued there but with the bishop's assent; and for that reason the archbishop never makes any visitation in London diocese. And hereupon the prohibition was denied.

## CASE 4

## Chapman's Case.

Barratry being an offence at common law, an indictment for it is good, though it conclude against the statutes. Ante, 31.

ERROR by Chapman, to reverse a judgment against him upon an indictment of being a common barrator; where having traversed it in the county of Devon before the justices of assize there, and the indictment found and verdict against him, and judgment being given, that he should pay one hundred marks for a fine, and be imprisoned for two months, and *ideo in misericordia*;

THE FIRST ERROR assigned was, Because the indictment is, that he was a common barrator *contra formam diversorum statutorum*, which is not good; for it is an offence at the common law, and there is not any statute to punish it. — *Sed non allocatur*: for so is the common course of indictments; and common barratry is an offence against divers statutes, *viz.* maintenance and the like.

Justices of oyer and terminer for the trial of an issue joined before them may award a *venire* returnable the same day on which the party is arraigned. Ante, 315.

THE SECOND ERROR, Because upon the indictment, process being awarded, he appeared *gratis* at the following assizes and pleaded not guilty; and then a *venire facias* was awarded returnable the same assizes, and was thereupon then tried and found guilty: that this *venire facias* was misawarded to make it returnable at the same assizes, where it ought to have been returnable at the next assizes; so as there ought to have been fifteen days betwixt the *teste* of the writ and the day of the return, and not to have been made returnable the same day. — *Sed non allocatur*: for it is the common course throughout all England. And as ROLLE, who moved it, said, that true it is, when he is in the gaol, such a trial may be the same assizes, but not so when the party is at large and comes in *gratis*. But THE COURT said, it is all one, and the trial good as well in the one case as in the other (a); and so it is here a good trial. Wherefore, &c.

2. Roll. Ab. 81. Cro. Eliz. 148. 1. Sid. 99. 335. 2. Inst. 568. 4. Inst. 464. 9. Co. 1. 1. Bac. Ab. 281. 1. Hale, 191. 1. Hawk. P. C. 526. (a) See 2. Roll. Ab. 96. where this is said to be against all precedent; and see 2. Hawk. P. C. 572, 573. 5. Bac. Ab. 259.

On an indictment for a finable offence, the entry of the judgment shall be *quod capiatur*.

THIRDLY, It was alledged for error, Because it is "*ideo in misericordia*," where it ought to have been "*ideo capiatur*," being upon indictment for an offence finable. But it was thereto answered by BEARE, that the record is "*ideo committitur gaole*" (being there present), to remain for two months; so there needs not an

1. Roll. Ab. 225. Jones, 407. Dyer, 67. 245. 8. Co. 60. Cro. Jac. 355. 348. But now by 5. & 6. Will. & Mary, c. 12 in trespass, ejectment, assault, or false imprisonment, no fine or *capiatur* ore fine shall be entered, but the plaintiff in satisfaction of it shall pay 6s. 8d. on the judgment, which shall be allowed him in costs. See 9. Mod. 285. 1. Salk. 54.

*ideo capiatur* but where he is absent, for the *ideo in misericordia* is but surplusage.—Wherefore for this cause *Curia advisare vult.*

### Pridgeon's Case.

CASE 3.

**P**RIDGEOON was brought to the bar upon a *habas corpus*; and it appeared upon the return thereof that he, at Lincoln, upon complaint to two justices of the peace next adjoining, was ordered to keep a bastard child, he being, according to the said order, the reputed father. From this order he appealed to the next quarter sessions of the peace; at which sessions the matter being examined, he was discharged, and the former order repealed. Afterwards at another quarter sessions of the peace, the matter being re-examined, it was ordered according to the first order, that he should be accounted the reputed father of the bastard, and should keep it; and that if he did not perform it, he should be apprehended and committed: and thereupon being apprehended and committed, and all this matter returned, THE COURT held, that he being discharged at the next sessions, to which he appealed according to the statute of 18. Eliz. c. 3. the second sessions hath no power to alter it; and because none were there to maintain this return, he was bailed, and day given, that if other matter were not shewn, &c. he should be discharged (a).

edition of Bott's Poor Laws, vol. i. page 442. to 447 (a) This case was moved again, and the judgment confirmed. Post. 350.

See also 13. and 14. Car. 2. c. 12. f. 19. and 6. Geo. 2. c. 13.

Henry Cort against the Bishop of St. David's and Others.

CASE 6.

Hilary Term, 8. Car. 1. Roll 454.

**E**RROR of a judgment in the grand sessions in the county of Pembroke, in an assise of *darrein presentment* (a) by Henry Cort, against The Bishop of St. David's, Dorothy Owen, and Thomas Pritchard, for the church of Stackpoole.

THE FIRST ERROR assigned was, Because upon the first day Thomas Pritchard appeared, and cast an essoin, but the other two made default, whereupon *re-summons* issued against them, returnable *die Martis* next following; and at the next day they cast an essoin, which was challenged and denied: and now moved to be an error, for that there was not *idem dies* given them, as there was to the first when he appeared and was essoined; and that there ought to have been one essoin allowed unto them.—*Sed non allocatur*: for *idem dies* shall not be given when they make default; and after once default and *re-summons*, an essoin is not allowable by the express words of the 12. Edw. 2. c. .

THE SECOND ERROR assigned was, Because the count is, that he presented *ad eandem*, and doth not name the church; so it is uncertain.—*Sed non allocatur*; for the church is first named in the plaint, and needs not to be named again.

THE THIRD ERROR assigned was, That *tales de circumstantibus* was awarded, which ought not to be in an assise, but upon *nisi prius*; which was held a manifest error, if it had been so.—But upon view of the record, there were not *tales de circumstantibus*, *sed quod habet decem tales secundum formam statuti*; for it is intended by their petition, that they took their assise in the grand sessions, which is appointed by the 34. Hen. 8. c. 26.

(a) This writ is now become obsolete by the use of *quare impedit*.

CRO. CAR.

Z

THE



CORT  
against  
BISHOP of ST.  
DAVID'S.

If the Court  
over-rules a  
party who of-  
fers a demurrer  
to evidence, this  
cannot be af-  
signed for error,  
but it is a proper  
case for a bill of  
exception.

S. C. Jones, 331.  
Hob. 15.  
Doug. 119.  
2. Term Rep.  
125.

THE FOURTH ERROR assigned was, Because the issue being, whether *Henry Cort* did last present one *Richard Dalber* the last incumbent, who was instituted and inducted upon his presentation, the plaintiff offered in evidence letters of institution, which appeared to be, and so mentions that they were sealed with the seal of the bishop of *London*, because the bishop of *St. David's* had not his seal of office there; and those letters were made out of the diocese: and the defendant had demurred thereupon, that those letters were sufficient, and the demurrer was denied; which *JONES* said was an error, because they ought to have permitted the demurrer, and should have adjudged upon it.—But IT WAS HELD, that the not admitting of the demurrer ought not to be assigned for error; for when upon the evidence the matter was over-ruled by the justices of assize, that was a proper cause of a bill of exceptions, and the remedy which the statute appoints in such case: and for the matter of the letters of institution sealed with another seal, and made out of the diocese, it was held, they were good enough, for the seal is not material, it being an act made of the institution: and the writing and sealing is but a testimonial thereof, which may be under any seal, or in any place; but of that point they would advise.

In what man-  
ner a verdict in  
*darrein present-*  
*ment* may find  
the issue.

Post. 348.

Watson, c. 15.  
Burn Eccl. 153.

THE FIFTH ERROR assigned was, Because the verdict finds the issue for the plaintiff, and that the church was full of the defendant, of the presentation of the other defendant, *per tempus semestre modo præteritum*, and doth not shew when, and how long time it was void, so as it might appear to the Court.—But *WHITE* answered, It is good enough; for it being found by the jury that the value of the church by the year was eighty pounds, and that it was void *per tempus semestre*, the Court shall intend it to be the full time of half a year; and the judgment being only for the 40*l.* is well enough: and so THE COURT agreed.

The grand sessi-  
ons of Wales  
may send a pro-  
hibition, and  
write to the spi-  
ritual courts  
within the prin-  
cipality.

1. Sid. 92.  
Jones, 330.  
Vaugh. 411.

THE SIXTH ERROR assigned was, Because the writ of admitting the plaintiff's clerk is awarded to the archbishop of *Canterbury*, for that the bishop of *St. David's* was a party, whereas the justices of the grand sessions have no power to write to the archbishop; for they have no power to punish him if he doth not obey.—And of that point THE COURT doubted: but it seemeth *primâ facie*, that they may well write to him; for it is now a court of the king's, and a *quare non admittit* lies, if he doth not admit; but when they were the marches in *Wales*, then they had no such power; and for that cause a *quare impedit* did lie in the adjoining counties, but not so at this day: but they would advise (a).

(a) It was mov-  
ed again, and the judgment affirmed. Post. 348.

## Brett against Read.

CASE 7.

**A**SSUMPSIT. Whereas he was indebted to the plaintiff in twenty pounds for rent arrear, in consideration whereof he assumed to pay, &c.

Upon *non assumpsit* pleaded, and verdict found for the plaintiff, it was moved in arrest of judgment by GERMYN, that this declaration is not good: for it is a real contract, if it were upon a lease for years; and a general *assumpsit*, which is but an *assumpsit* in law, lies not for it, no more than upon a recognizance: also, it doth not appear that it was a rent upon a lease for years, but it might be rent-service, rent-charge, or rent-seck that is behind; which is more strong against the plaintiff.

GRIMSTON moved, for the plaintiff, that the action lies, because it shall be intended rent upon a lease for years, which is by contract; and then an *assumpsit* may well be maintained upon it: and vouched the case of *Sir George Mansfeull*, 17. Jac. 1. who brought an *assumpsit* against J. S. supposing that, in consideration the defendant might have and enjoy quietly the herbage of such a park for three years, he promised to pay one hundred pounds; and it was adjudged that the action well lay, because it is but in nature of rent.

But ALL THE COURT held here, that the action lies not upon the general promise: but if he had alledged, that in consideration he should forbear the payment until such a day, or upon such a special consideration, then the action would lie, but not upon a general *assumpsit*, for the reasons before alledged; and the case cited may be good law, for it is a special promise to permit him to enjoy: and it was not a lease, nor for rent upon a lease. Wherefore it was here adjudged for the defendant.

An *assumpsit* will lie on an express promise to pay a debt due by specialty upon a new consideration or forbearance, but not upon a promise implied by law. Post. 415.

S. C. Jones, 326. 364. I. Roll Ab 8. Moor, 340. Cro. Jac. 306. 598. 688. 1. Sid. 279. Hob. 284. Cro. Eliz. 67. 118. 242. 786. 859. 1. Brownl. 14. 3. Lev. 150. Hard. 366. 1. Leon. 43. 156. Sirange, 648. 2. Bl. Rep. 1270. 1. Com. Dig. 144. Cowp. 128.

## Lord Hastings against Sir Archibald Douglass.

CASE 8.

Trinity Term, 8. Car. 1. Roll 1331.

**T**ROVER AND CONVERSION, as administrator of *Serjeant Davy*, for divers jewels. Upon not guilty pleaded, the jury found for part "not guilty;" for other jewels, that he is "guilty;" and for sixty-five great pearls, and sixty-five small pearls, and a diamond chain, they found a special verdict, that

SERJEANT DAVY was possessed of them, and being so possessed, made his will, and thereby devised the use and occupation of all his plate, hangings, and jewels to *Dame Elionor* his wife, during her widowhood, "she giving good security to my daughter *Lucy*, *Lady Hastings*, to deliver and leave the same to my said daughter *Lucy* at the day of her death or second marriage, which should first happen;" that he died possessed of those jewels, and that after his death the administration of the goods of the said *Sir John Davy* was committed to the plaintiff: that the said *Elionor*, the wife of *Sir John Davy*, was the daughter of *Lord Audley*, earl of *Castlehaven*, not retain them as her paraphernalia, against this devise of the use of them only; for the express declaration of the husband will controul the implication which the law would otherwise have made.

A husband devises the use of all his plate and jewels to his wife during her widowhood, she giving security to leave the same to his daughter on her death or second marriage; this is not a condition, but a limitation; and though the wife usually wore them ut ornamenta corporis sui, yet she cannot retain them as her paraphernalia, against this devise of the use of them only; for the express declaration of the husband will controul the implication which the law would otherwise have made.

See 1. Com. Dig. 5; 8.

Z 2

and

LORD HAS-  
TINGS  
against  
SIR ARCHI-  
BALD  
DOUGLAS.

and that she in the life of *Sir John Davy* used the said jewels, and "*ut ornamenta corporis sui*" usually wore them : that afterwards the said *Elionor* married with the defendant, and that he converted those jewels, &c. : and if the Court shall adjudge for the plaintiff, they find for the plaintiff, and damages 370l.; and if not, for the defendant.

S.C Jones, 334.  
S. C. 1. Roll.  
Abr. 911.

Moor, 213. 216.

2. Vern. 246.

1. P. Will. 729.

2. P. Will. 78.

542

2. Eq. Caf. 627.

Pr. Ch. 27. 295.

2. Leon. 166.

Noy's Max 168.

Thatch 369.

1. Com. Dig.

558.

2. Bl. Com. 436.

2. Bac. Ab. 442.

2. Espin. Dig.

336.

Co. Lit. 20. a.

note (5).

1. Brown's C. C.

274.

Upon this special verdict, it was argued at the bar by GERMYN, for the plaintiff, and by CALTHROP, for the defendant : and now this Term it was openly argued at the bench.

BERKLEY and JONES, *Justices*, argued for the defendant, that she being the daughter of a nobleman, and permitted to use them frequently, "*ut ornamenta corporis sui*," and they being convenient for her degree, she should have them as her PARAPHERNALIA; and when there be not debts to be paid (as it doth not appear there were any) she shall have them against the executors or administrators of her husband, and that the husband cannot dispose of them from his wife by his will; but instantly by his death, the possession of them being in the wife's custody, the property is vested in her, and the husband cannot give them away : and that is of necessity and for conveniency in the law; for it is not reasonable the husband should leave her naked of those jewels which she usually did wear, and are fit (according to her calling) to wear. And it appears by *Linwood*, that the wife against her husband's will hath such an interest in goods which are her PARAPHERNALIA, that her husband has nothing to do with them; but she may make a will of them in her husband's life-time, and may dispose of them *in vitâ mariti invito marito*. But they said, this is not allowable in our law, that she should dispose of them in her husband's life-time; and when the husband doth not dispose of them, they are instantly vested in the wife : and although the husband may make a gift of them in his life-time, yet he cannot make a will of them, to dispose, &c. : and compared it to the case where a wife hath a term and takes husband, he may give and dispose thereof in his life-time, but he cannot dispose of it by his will; as in the case of *Bransby v. Grantham*, and the case of *Bracebridge*, *Plowd.* 416. and in the case 1. *Hen.* 5. "*Exécutor*," 108. The king may give the jewels of his crown by letters patents, but he cannot by his testament dispose of them (a).

Co. Lit. 300.

351. a.

Pl. Com. 525.

Moor, 214.

2. Vern. 245.

Chan Cases,

129.

1. Peere Will.

50. 651.

Powel on Cont.

256.

BERKLEY, *Justice*, said, That this permission of the wife to wear them usually, is as a gift of them to her by her husband : and compared it to the case of 11. *Hen.* 4. *pl.* 83. where one takes my son and clothes him, or my wife and clothes her, it is as it were a gift of the said apparel to them : and as by the custom of *London*, and in some places in *Wales* (as JONES said), the wife shall have the moiety of the goods whereof her husband dies possessed, yet her husband in his life-time may give all the goods, but by his will he cannot prejudice her concerning her part; where he concluded, that she should have them notwithstanding the will.

(a) Wood's Inst. 110. Cro. Eliz. 464. 682.



JONES, *Justice*, said, that by the civil law, as the condition to tie her from marriage, so the limitation to have those jewels during her widowhood is void, because she is absolutely possessed of them.—Whereupon they concluded, that judgment should be given for the defendants.

LORD HAS-  
TINGS  
*against*  
SIR ARCHI-  
BALD  
DOUGLAS.

But RICHARDSON, *Chief Justice*, and MYSELF, argued to the contrary, and that this is a good will, and that she may not take them but according to the will: but if the husband had not made a will, but had left them to the disposition of the law, and the question had been betwixt the executor or administrator and the wife, where there be not any debts or legacies to be paid, or where there be *assets* Moor, 216. to pay all debts and legacies besides those jewels, there peradventure the law will allow her to take and enjoy them as her PARAPHERNALIA; but where the husband hath made a will and limited how she shall have them, she ought to take them as the husband appointed, and his will is as good and as well to be performed as his gift in his life-time: and that it is not like the case of 11. *Hen. 4. pl. 83.* for there it is a good gift to the son and to the wife by the ravisher, and the husband may well assent to them: so are the cases of 11. *H. 4. pl. 12. and 34. Hen. 6. pl. 10.* that goods dedicated to the service of a chapel or church are a good gift to the wardens of them in law: but this permission by the husband for the wife to wear them cannot be a gift of them in deed nor in law; for the husband cannot give ought to the wife, they being both but one person in law. And as to the objection, that although an husband may dispose of them by act in his life, yet he cannot by his will; it was answered, True it is, that a man who hath a thing real in another's right, as a term, although he may give, yet he cannot devise it; as in *Bracebridge's Case (a)*: so where an executor makes a gift of goods which he hath Co. Lit. 351. as executor, it is a good gift; but a devise of them is not good, because he hath them *in autre droit*: but of all chattels personal, although the wife had them before marriage, the absolute property by the marriage is vested in the husband, and he may give them in his life, or dispose of them by his will; so of those goods which are termed PARAPHERNALIA, the absolute property is in the husband, and therefore he may well devise them. And to the cases, that the husband may by gift of all his goods *bonâ fide* prevent his wife that she shall Co. Lit. 300. a. not have any part of them, notwithstanding the custom in *London, Wales*, and elsewhere, yet by his will, if he devise them, it shall 351. a. not frustrate what she ought to have by the custom, they agreed to be good-law; for custom is another law, and instantly by the death of the husband fixeth the interest in the wife: but the goods which she claims as PARAPHERNALIA be not given to the wife, but those which are of necessity and conveniency for her; and when the husband leaves her what is for her necessity, *viz.* necessary apparel, he may well make a disposition of the residue by his will: and for that purpose was cited 19. *Hen. 6. pl. 14.* A wife for her *quarantine* may have her living *de communi*, but she may not take any thing unless for necessity: and where the civil law saith, that she may make

(a) Plowd. 192.

LORD HAS-  
TINGS  
against  
SIR ARCHI-  
BALD  
DOUGLAS.

1. Peere Will. 4.  
Co. Lit. 20. a.  
1. Brown's Caf.  
in Ch. 274.

3. Co. 95.

make a will in the life of her husband of her PARAPHERNALIA yet the common law, whereby we are to be guided, is expressly contrary to it, that she may not make a will of any goods but with her husband's assent, and then it is as his own gift; but of an obligation, or things in action, a wife may make executors by assent of her husband, and may make her husband her executor, as appears by the books 4. *Hen. 6. pl. 31.* 39. *Hen. 6. pl. 27.* 3. *Edw. 3. "Devise," 12.* 26. *Edw. 3. pl. 71.*; and the interest and possession, and property of such goods as are called PARAPHERNALIA are in the husband, and he may devise them to his wife: and that she shall take them by the devise appears 33. *Hen. 6. pl. 31.* where he devised to his wife her apparel, and the justifies the taking of them by the devise and delivery of the executor; 37. *Hen. 6. pl. 28.* that she ought to take only her necessary apparel; 1. *Eliz. Dyer, 166.* 18. *Edw. 4. pl. 11.* 12. *Hen. 7. pl. 23.* & *pl. 24.* that the property and possession of those goods be in the husband, and she may not make a will of them without her husband's assent.— And a case was cited in the exchequer in *Trinity Term, 28. Eliz.* betwixt the Lord Treasurer and others executors of viscount *Bindon*, against *Mary* viscountess *Bindon* (a), in an action of trover and conversion of jewels of the value of 1000*l.* she pleads to all besides such jewels (which were a chain and bracelets not exceeding the value of 160*l.*), not guilty: and as to them she pleads, that she was the wife of viscount *Bindon* at the time of his death, and she usually wore those jewels as ornaments of her body; and avers, that the executor had *assets* to satisfy his funeral, and all his debts and legacies, besides those jewels: and issue was taken, that they had not *assets* to satisfy all the debts and legacies besides those goods (b); so thereby it is to be observed, that jewels of 160*l.* for a viscountess were not allowable for PARAPHERNALIA. And it was answered, although here in this case the defendant be the daughter of an ancient baron of this realm, and of an earl in *Ireland*, yet being married to *Serjeant Davy*, she ought to have them as his wife: and there is not any necessity she should have a chain of diamonds, and the said sixty-five great pearls, and the sixty-five small pearls, which are things hanging loose, and are not in any chain or bracelets; and they be not for any necessity, for ornament, or for covering. But *quâcunque viâ datâ*, the husband having expressly disposed of them by his will, she may not against his will take them without the assent of the administrator, and without delivery, and not of her own head detain them without entering security. And where it is alledged, that in the civil law a condition to restrain a second marriage is not allowed; this is no condition, but a limitation only, and it is reasonable she should take accordingly. And it was alledged, that this is not any *devise* of those jewels, but only *the use and occupation* (c) of the plate, hangings, and jewels during her widowhood, and no absolute gift of them; as is in the case of *the Grayle* (d), and in *Welden's Case* (e): and they concluded, that it is a good disposition by the will, and a declara-

(a) 1. *Leon. 166.*

(b) That this case is not truly reported here, and that there is no judgment entered on the roll, *vide MSS. plac. fo. 161. adjncm.*—*L. C. B. PARKERS MSS.*

(c) It is now settled, that limitations over in a will of the *thing itself* are good. 8. *Co. 95.* 10. *Co. 46.* 2. *Freem. 157.* 1. *Peere Will. 1.*

(d) *Year-Book, 37. Hen. 6. pl. 30.*

(e) *Plowd.*

tion of his intent, and takes away that which otherwise she might claim by the law; and his express declaration controuls any implied gift, as is pretended: and forasmuch as she hath not performed it, the limitation is determined, and neither she nor her husband can have them. Wherefore they concluded for the plaintiff.

LORD HASTINGS  
against  
SIR ARCHIBALD  
DOUGLAS.

### The King against Bagshaw.

CASE 9.

**I**NFORMATION by Fletcher for the king and himself against Bagshaw, and demands twenty-two pounds upon the 5. Eliz. c. . for occupying the trade of a goldsmith, not being an apprentice to that trade. The defendant pleaded the custom of London, "that one being an apprentice for seven years, and made freeman of London of any trade, may use any other trade in the same city:" and shews, that he was bound an apprentice to the art of the cordwainers, and served therein for seven years, and was made freeman of London; whereby he justifies, &c. The king's attorney demurs thereupon; and it was argued divers times at the bar.

By the custom of London an apprentice to one trade may use any other, notwithstanding 5. Eliz. c. 4. Post. 516.  
8. Co. 126.  
1. Bl. Com. 75.  
3. Bac. Ab. 533.

FIRST, Exception to the manner of the plea, because he pleads *quod uti possit* any other trade, and not *quod usus fuit*: and for that was relied upon 22. Edw. 4. 8. "*Prescription*," *quod possit tourner son plough*, and doth not say that he hath used to turn, &c. is not good. But it was thereto answered by GRIMSTON, that this being alledged by way of custom in the city, and not as a particular prescription, is well enough; for peradventure it is a thing intended, and so not used in fact: and in proof thereof was cited 21. Edw. 4. 28. *Old Book of Entries*, 141. pleading, that every citizen and freeman may devise in mortmain, allowed to be good.—THE COURT inclined to that opinion.

In pleading a custom of London, it is sufficient to say that every citizen may use the customary privilege.  
3. Leon. 83.  
Ray. 4.  
1. Lev. 12. 177.

SECONDLY, The matter of the plea is not good, because custom cannot be alledged against a statute. But it was thereto answered, that being the custom of London (which customs are confirmed by parliament), it shall be good.—But thereof THE COURT doubted, and delivered not any opinion, because the king's attorney this Term waived the demurrer, and took issue upon the custom, and prayed that the defendant might rejoin; whereupon the defendant moved now by ROLLE, that he might waive his plea, and plead not guilty.—But THE COURT doubted whether he should be received, without the assent of the attorney general; wherefore they would advise: and afterwards the attorney being moved, would not assent; whereupon he rejoined, &c.

The king may withdraw a demurrer; but this will not intitle the defendant to withdraw his special plea and plead the general issue, except the attorney general consents.  
Post. 361. 513.  
Ante, 291.  
Styles, 479.  
Cro. Jac. 85.  
1. Burr. 516.

Vaugh. 65. Hard. 555. Plowd. 322. a. 1. Saund. 341. Ray. 4. Barnes, 155. Strange, 266. 4. Com. Dig. 463.



## CASE 10.

## Cort against The Bishop of St. David's.

Ante, Page 341.

A verdict in *darrein presentment* finding the issue for the plaintiff, and that one of the defendants was incumbent on the presentation of the other defendant *per tempus semelre modo præteritum* is good, without finding when the church became void. Cowp. 828.

THIS Case was moved again by NOY, *Attorney General*; and he principally insisted, that the verdict was not good, and the jury had not well enquired, because they did not find when the church became void, but said in their enquiry *quod tempus semelre modo transiit*, which may be long time before the writ brought.— But ALL THE COURT *seriatim* delivered their opinions, that the verdict is good; and it is not necessary to find when the church became void; but *modo transiit* shall be intended, that the six months passed hanging the writ, which is not enquirable in respect of the damages: and when here the value of the church is enquired and found of the annual value of eighty pounds, and that the defendant *Pritchard* is found to come in *ex præsentatione* of the defendant *Owen*, so the patron and incumbent are named in the writ, although the defendant may be in for six months by the same patron which was named before the writ brought, he ought to be removed: and the judgment is for forty pounds, which is the moiety of the value; therefore the enquiry and the judgment are good enough. And for all the other errors assigned, THE COURT allowed none of them: and although the precedents be, that in the declaration he declares, *et unde dicit quod ipse (idem the plaintiff) ad eandem ecclesiam præsentavit*, and here omits the words “*ad eandem ecclesiam*,” yet because it cannot have any other intendment, but that he presented to the same church mentioned in the plaint; and the words after, that “he was” admitted, instituted, and inducted *in eadem*,” which refer to the church mentioned in the plaint; therefore it was held good enough. Whereupon judgment was affirmed.

## CASE 11.

## Farewether's Case.

An indictment on an issue joined in the king's bench may be tried in the county where the offence was committed, by writ of *nisi prius*; and the attorney general may, by the king's letters, have the writ without leave of the Court.

Savil, 2.

4. Co. 43.

2. Inst. 424.

Raym. 267.

4. Bl. Com. 344.

6. Mod. 246.

123. 2. Hawk. P. C. 578. 4. Com. Dig. 463.

A CERTIORARI was awarded to the justices of assize of the county of *Suffolk* to remove an indictment of common barratry against one *Farewether*, a justice of peace of the same county: and the indictment being removed, and the defendant traversing it, and rule given for trial thereof at the bar, and that the defendant should bear the charges of the witnesses, because the record was removed at the defendant's suit,

NOY, *the King's Attorney*, moved, that it should be tried in the county by *nisi prius*, because otherwise divers witnesses would not appear to prosecute by reason of the charge and trouble; and that the king hath his election in what court and in what manner he will try his suits.

But THE COURT conceived, because it concerned a justice of the peace, who peradventure might have incurred the displeasure of many, by reason of his diligent executing his office; and for that it is a cause which will require great examination, and it is not fit, by reason of the shortness of time, to be tried at the assizes by *nisi prius*;

*prius*;

*prius*; therefore they denied his motion, and held it convenient it should be tried *in banco*: and divers precedents were cited of one *Austen* and of one *Whytler* and others, where, in such case, trials were *in banco*. But the king's attorney said, those were by consent; which was denied. And *KEELING*, Clerk of the Crown, said, that divers precedents have been of such trials upon indictments *in banco* without any consent of the parties, and against the will of the prosecutors, and in more remote counties. And THE COURT said, by the statute of *nisi prius* it is appointed, "that trials shall be *in banco*, where the causes *magna indigent examinatione*," as this case doth: but if the king will signify his pleasure that they shall be tried by *nisi prius*, it is fit he should be obeyed; yet not upon suggestion of the parties only. Afterward the king by his letters signified his pleasure, that it should be tried by *nisi prius*.

FAREWETHER'S CASE..

See the Year-Books 12. Edw. 2. pl. 3. and 27. Edw. 3. pl. 4. 2. Inst. 421. 4. Inst. 159.

## Viscount Dunbarr's Case.

CASE 12.

THE JUSTICES AND BARONS were assembled at *Serjeants-Inn*, in *Chancery-lane*, by the king's command, upon a question concerning the king, in a case prosecuted by *Dr. Chambers* against *Viscount Dunbarr*; where a fee farm, due to the king out of the lands of the *Viscount of Dun*, being arrear for divers years, was omitted out of the charge by the connivance or negligence of the clerk, who ought to have put it in charge, and so continued until the pardon of 21. *fac. 1*. Whether it were discharged by the pardon?—And IT WAS RESOLVED, that it was not; for it is a debt to the king, and the omission of a clerk shall not prejudice him; as also, because it is excepted by the pardon, if not by the words, at leastwise in the intent.

Debt for rent to the king shall be excepted out of a pardon, though not put in charge in the exchequer. 5. Co. 47. 3. Mod. 241. 1. Lev. 155. Hard. 369.

## Peck against Ambler.

CASE 13.

Michaelmas Term, 9. Car. 1. Roll 348.

ASSUMPSIT. Whereas the defendant, 1. Car. 1. promised the plaintiff, that he should enjoy such lands in possession, and that he would save him harmless concerning any action and suit against him for them; that he was ousted of the possession by *Meddlecourt*, 1st July, 3. Car. 1. and that a good recovery was had against him in an *ejectione firmæ*, 2. Car. 1. wherein he was condemned in damages and costs seven pounds, by reason whereof he feared to be arrested: that upon the 1st August, 7. Car. 1. he gave unto him notice thereof, and required him to discharge him of that judgment, and save him harmless from it; and that the defendant had not discharged the judgment, whereby he remained subject thereto, and durst not go about his business, to his damages, &c. The defendant pleaded the statute of limitations, that this ouster was upon a judgment in *Trinity Term*, 2. Car. 1. and the notice and request in July, 2. Car. 1. so more than six years after the cause of action, and before the action brought; and traverseth the ouster in July, 3. Car. 1. or any other time after July, 2. Car. 1. And hereupon the plaintiff demurred.

To an action on a promise of quiet enjoyment, and to save the possessor harmless, the defendant may plead the statute of limitations. Cowp 218.

WHYTFIELD,

## CASE 10.

## Cort against The Bishop of St. David's.

Ante, Page 341.

A verdict in *darrein presentment* finding the issue for the plaintiff, and that one of the defendants was incumbent on the presentation of the other defendant *per tempus semelstre modo præteritum* is good, without finding when the church became void. Cowp. 828.

THIS Case was moved again by NOY, *Attorney General*; and he principally insisted, that the verdict was not good, and the jury had not well enquired, because they did not find when the church became void, but said in their enquiry *quod tempus semelstre modo transvit*, which may be long time before the writ brought.— But ALL THE COURT *seriatim* delivered their opinions, that the verdict is good; and it is not necessary to find when the church became void; but *modo transvit* shall be intended, that the six months passed hanging the writ, which is not enquirable in respect of the damages: and when here the value of the church is enquired and found of the annual value of eighty pounds, and that the defendant *Pritchard* is found to come in *ex præsentatione* of the defendant *Owen*, so the patron and incumbent are named in the writ, although the defendant may be in for six months by the same patron which was named before the writ brought, he ought to be removed: and the judgment is for forty pounds, which is the moiety of the value; therefore the enquiry and the judgment are good enough. And for all the other errors assigned, THE COURT allowed none of them: and although the precedents be, that in the declaration he declares, *et unde dicit quod ipse (idem the plaintiff) ad eandem ecclesiam præsentavit*, and here omits the words “*ad eandem ecclesiam*,” yet because it cannot have any other intendment, but that he presented to the same church mentioned in the plaint; and the words after, that “he was” “admitted, instituted, and inducted in *eadem*,” which refer to the church mentioned in the plaint; therefore it was held good enough. Whereupon judgment was affirmed.

## CASE 11.

## Farewether's Case.

An indictment on an issue joined in the king's bench may be tried in the county where the offence was committed, by writ of *nisi prius*; and the attorney general may, by the king's letters, have the writ without leave of the Court.

Savil, 2.

4. Co. 43.

2. Inst. 424.

Raym. 267.

4. Bl. Com. 344.

6. Mod. 246.

123. 2. Hawk. P. C. 578. 4. Com. Dig. 463.

A CERTIORARI was awarded to the justices of assize of the county of *Suffolk* to remove an indictment of common barratry against one *Farewether*, a justice of peace of the same county: and the indictment being removed, and the defendant traversing it, and rule given for trial thereof at the bar, and that the defendant should bear the charges of the witnesses, because the record was removed at the defendant's suit,

NOY, *the King's Attorney*, moved, that it should be tried in the county by *nisi prius*, because otherwise divers witnesses would not appear to prosecute by reason of the charge and trouble; and that the king hath his election in what court and in what manner he will try his suits.

But THE COURT conceived, because it concerned a justice of the peace, who peradventure might have incurred the displeasure of many, by reason of his diligent executing his office; and for that it is a cause which will require great examination, and it is not fit, by reason of the shortness of time, to be tried at the assizes by *nisi prius*;

*prius*;



*prius*; therefore they denied his motion, and held it convenient it should be tried *in banco*: and divers precedents were cited of one *Austen* and of one *Whytler* and others, where, in such case, trials were *in banco*. But the king's attorney said, those were by consent; which was denied. And *KEELING*, Clerk of the Crown, said, that divers precedents have been of such trials upon indictments *in banco* without any consent of the parties, and against the will of the prosecutors, and in more remote counties. And THE COURT said, by the statute of *nisi prius* it is appointed, "that trials shall be *in banco*, where the causes *magna indigent examinatione*," as this case doth: but if the king will signify his pleasure that they shall be tried by *nisi prius*, it is fit he should be obeyed; yet not upon suggestion of the parties only. Afterward the king by his letters signified his pleasure, that it should be tried by *nisi prius*.

FAREWETHER'S CASE.

See the Year-Books 12. *Edw.* 2. pl. 3. and 27. *Edw.* 3. pl. 4. 2. Inst. 421. 4. Inst. 159.

## Viscount Dunbarr's Case.

CASE 12.

THE JUSTICES AND BARONS were assembled at *Serjeants-Inn*, in *Chancery-lane*, by the king's command, upon a question concerning the king, in a case prosecuted by *Dr. Chambers* against *Viscount Dunbarr*; where a fee farm, due to the king out of the lands of the *Viscount of Dun*, being arrear for divers years, was omitted out of the charge by the connivance or negligence of the clerk, who ought to have put it in charge, and so continued until the pardon of 21. *fac.* 1. Whether it were discharged by the pardon?—And IT WAS RESOLVED, that it was not; for it is a debt to the king, and the omission of a clerk shall not prejudice him; as also, because it is excepted by the pardon, if not by the words, at leastwise in the intent.

Debt for rent to the king shall be excepted out of a pardon, though not put in charge in the exchequer. 5. Co. 47. 3. Mod. 241. 1. Lev. 135. Hard. 369.

## Peck against Ambler.

CASE 13.

Michaelmas Term, 9. Car. 1. Roll 348.

ASSUMPSIT. Whereas the defendant, 1. *Car.* 1. promised the plaintiff, that he should enjoy such lands in possession, and that he would save him harmless concerning any action and suit against him for them; that he was ousted of the possession by *Meddlecourt*, 1st *July*, 3. *Car.* 1. and that a good recovery was had against him in an *ejectione firmæ*, 2. *Car.* 1. wherein he was condemned in damages and costs seven pounds, by reason whereof he feared to be arrested: that upon the 1st *August*, 7. *Car.* 1. he gave unto him notice thereof, and required him to discharge him of that judgment, and save him harmless from it; and that the defendant had not discharged the judgment, whereby he remained subject thereto, and durst not go about his business, to his damages, &c. The defendant pleaded the statute of limitations, that this ouster was upon a judgment in *Trinity Term*, 2. *Car.* 1. and the notice and request in *July*, 2. *Car.* 1. so more than six years after the cause of action, and before the action brought; and traverseth the ouster in *July*, 3. *Car.* 1. or any other time after *July*, 2. *Car.* 1. And hereupon the plaintiff demurred.

To an action on a promise of quiet enjoyment, and to save the possessor harmless, the defendant may plead the statute of limitations. Cowp 218.

WHYTFIELD,

PECK  
against  
AMBLER.

WHYTFIELD, *for the defendant*, now moved, that the plea made good the matter alledged, because the breach was before the six years.

5. Co. 24.

THE COURT inclined to that opinion; but because he failed in the other part of the breach of the *assumpsit*, viz. in not saving harmless, but suffering the judgment to remain in force, and by reason thereof he was endangered to be arrested, which part is not answered, therefore the plea was held ill: for by the judgment he is damnified, although it be not alledged that execution is sued, he being subject to the execution and in danger to be charged: and although the defendant be a stranger to this suit wherein damages and costs are given, and therefore ought to have notice, yet when notice is given unto him thereof, he ought to procure him to be discharged; and therefore the plea is ill on that part; and the demurrer being general, judgment is to be given for the entire *assumpsit* against him. And it was therefore adjudged for the plaintiff.

On an entire contract, to be performed at stated times, an action lies for the whole contract, on the first breach of performance.

AND JONES and BERKLEY held, that if a man assume to pay fifty quarters of malt in five years, every year ten quarters, if he fail of the payment of any of them, an *assumpsit* lies, and he shall recover damages for all which is arrear, and for all the residue of the five years; but I doubted thereof: but for the principal we all agreed.

Ante, 241. Dyer, 113. a.

#### CASE 24.

A *procedendo* refused to a suit removed from the sheriff's court in London for calling a woman a whore.

Post. 394. 487.  
4. Co. 18.  
4. Burr. 203.  
Stra. 187. 545.  
471.  
Fort. 347.  
B. R. H. 392.  
2. Mod. 114.  
Andrews, 7.

#### Hart's Case.

MARGARET HART brought an action in the sheriff's court in London against another woman, for saying, that she was "an arrant whore, and went from chamber to chamber playing the whore." This was removed by *habeas corpus* into this court, and bail put in.

STONE moved, *for the plaintiff*, to have the cause remanded, because for these words action lies not here, but they were actionable there by the custom of London, because she is there punishable for such offence.

BUT THE COURT denied to grant a *procedendo*, and said, an action lies not for these words, but that she should be sued for defamation in the spiritual court only.

1. Com. Dig. 180. Douglas, 380.

#### CASE 15.

#### The Case of Pridgeon.

Vide Ante, Page 341.

If the session, upon appeal, reverse an order of bastardy made by two justices, the act of the session is final, and no other session or authority can meddle.

Ante, 341.  
Post. 471.

THIS Case was now moved again by GRIMSTON.—And ALL THE COURT, RICHARDSON, *Chief Justice*, being present, delivered their opinions *seriatim*, that the order in the first sessions was concluding, and the order in the last sessions was merely void; for the 18. Eliz. c. 3. appointing, that upon appeal to the sessions from an order of two justices of the peace, their order shall bind him who is adjudged to be the reputed father, and he in this case having appealed to the sessions, and they making an order in court, that order is final, and no other session nor authority may meddle therewith.

Jones, 147. 330. 2. Bulst 343. 355. 1. Salk. 122. 482. Ld. Ray 1423. B. R. H. 301. Strange, 105. 475. 503. 1. Seff. Cal. 131. 1. Com. Dig. 584. and see Mr. Conft's edition of Bott's Poor Laws, vol. i. p. 443.

JONES,

JONES, *Justice*, to prove this, said, it was resolved by all the Justices of *England* upon conference, in the case of one *Andrew Windfor* (a), upon the 43. *Eliz. c.* . of charitable uses, if an appeal be upon an order of the commissioners of charitable uses to the lord keeper, and he by decree confirm the order, that confirmation is perpetually binding; and there cannot be a bill of review thereof: so it hath been resolved, where, upon the 37. *Hen. 8. c.* . for tithes in *London*, if a judgment be given by the lord mayor, and upon an appeal to the lord keeper that judgment be affirmed, &c. the party is concluded, and shall not have aid by bill of review.

PRIDGON'S  
CASE.

ALL THE COURT thereupon resolved, that the second order made at the second sessions was merely void, and his commitment unlawful; wherefore he was absolutely discharged.

AND IT WAS HELD, that the 3. *Car. 1. c. 4.* doth not aid this case; for the statute there is, that "if the two next justices of peace make not provision for the bastard, the justices of peace at their quarter sessions shall settle an order for keeping of the bastard, as the two next justices ought;" but it doth not give more power or authority, nor gives authority to one sessions to alter that which in a former sessions was ordered.

The statute  
3 *Car. 1. c. 4.*  
doth not give  
authority to one  
sessions to alter  
that which a  
former sessions  
has ordered.  
Post. 471.

1. Salk. 122. 1. Stra. 475. 1. Bott's Poor Laws, 444. Dougl. 632.

(a) Ante, 40.

See 6. Geo. 2. c. 31.

Wickham and Others against Enfeild and Elizabeth his Wife. CASE 16.

Michaelmas Term, 8. Car. 1. Roll 66.

ERROR of a judgment in DOWER, by Wickham and others, against Enfeild and Elizabeth his wife, late the wife of William Symms, which she demanded as her dower of the lands of William Symms, her former husband.

To dower, the  
defendant may  
plead *nunques  
accouple in ma-  
trimonio*; and  
if issue be taken  
thereon, the fact  
shall be tried by  
certificate.

The defendant pleaded "*n' unques accouple in loyal matrimony.*"

Issue, "*quod fuit accouple in loyal matrimony.*"

A writ was thereupon awarded to the bishop, who certified, that she was accoupled "*in vero matrimonio cum prædicto WILLIELMO, sed clandestino, et quod WILLIELMUS et ELIZ. thori et mensæ participatione mutuo cohabitaverunt usque ad mortem prædicti WILLIELMI.*" And upon this certificate judgment was given for the demandant.

The error assigned was, That there was not a writ original nor warrant of attorney for the defendant. But, upon diminution alledged, the writ was certified: But for the warrant of attorney, because it was not assigned of record that diminution might be alledged, it was held it was not now assignable.

The want of a  
warrant of at-  
torney, if al-  
signed for error,  
must be assigned  
on record.  
Cro. Jac. 6. 142.

THE SECOND ERROR assigned, Because the writ of view (b), upon view demanded, was awarded and returned, and nothing indorsed thereupon, that the sheriff delivered the view.—But because he afterwards appeared and pleaded, he shall not now have advantage thereof. Also, THE COURT said, it was good enough without the sheriff's name indorsed upon it.

A writ of view  
is good without  
an indorsement  
on the return.  
Ante, 190.

(b) See the 4. Ann. c. 15. s. 8.

THIRDLY,



A bishop's certificate of the fact of marriage is good, without naming day or place of marriage

2. Roll. Ab. 591.

THIRDLY, It was alledged for error, That there was neither day nor place of the marriage mentioned in the bishop's certificate.—*Sed non allocatur*: for the day or place of the marriage is not material; for it is not issuable, because the certificate from the bishop is concluding.

Co. Lit. 33. a. Dyer, 313. 9. Co. 19. 2. Salk. 437. Comb. 473.

In dower, on an issue of "*accouple in loyal matrimonie*," a certificate "*qu'el fuit accouple in VERO matrimonio sed clandestino*" is good.

2. Roll. Ab. 591.

2. Bac. Ab. 284.

Salk. 437.

Andr. 227.

THE FOURTH ERROR was assigned *ore tenus* by PULESTON, of counsel with the plaintiff in the writ of error, that this certificate is not good; for it doth not answer to the words in the issue, which are, "*quod ne unques accouple in loyal marriage*;" and he ought accordingly to have answered, "*quod fuit copulatus in legitimo matrimonio*." And he doth not answer to the words in the issue, but, "*quid vero matrimonio, sed clandestino copulati fuerunt, &c.*" for that it was a true matrimony, and that they lived together at bed and board, is but argumentative, that they were lawfully married.—*Sed non allocatur*: for *vero matrimonio*, although *clandestino copulati fuerunt*, is as good as *legitimo matrimonio*, for they be all one in intendment, although they be not the same words; and although it be *clandestino*, it doth not vitiate the marriage: and when it is added, that *thori et mensæ participatione durante vitâ* the said WILLIAM and ELIZABETH *cohabitaverunt*, that proves they continued as husband and wife during his life, and it is not now to be questioned. WHEREFORE the judgment was affirmed.

#### CASE 17.

#### Sharp's Case.

An indictment for perjury on 5. Eliz. c. 9. must shew with convenient certainty that the oath was concerning land; that it was material to the issue, and prejudicial to the party.

Ante, 322.

2. Inst. 167.

1. Hawk. P. C.

332

1 d. Ray. 267.

1. Peere Will.

169.

Dougl. 156.

1. Term Rep. 67.

SHARP was indicted of perjury upon the 5. Eliz. c. 9. for that whereas one Henry Dampart was seised in fee of a manor in Sheapside, in the county of Leiceſter, whereof one great waste, containing two hundred acres, lying betwixt such a river on one side, and such a brook on the other side, was parcel; and whereas there was a suit in chancery betwixt the said Henry Dampart and the Earl of Rutland, and a commission issued under the great seal for the examination of divers witnesses; and interrogatory was exhibited, Whether he knew the parties; whether he knew the said parcel of waste in question; and if it were the soil and freehold of the Earl of Rutland, and parcel of his manor of Sheapside, or not? he being examined upon these interrogatories before the said commissioners, falsely, voluntarily, and corruptly, deposed upon his oath, that it was the soil and freehold of the said Earl of Rutland, and parcel of his manor of Sheapside; UBI REVERA it was not the soil nor freehold of the said Earl of Rutland, nor parcel of his manor of Sheapside, but parcel of the manor of the said Henry Dampart, in Sheapside; and so committed wilful and corrupt perjury against the statute.

BABINGTON moved to quash the indictment, Because he doth not shew what was the issue in chancery, nor that this land was there in question; nor it doth not appear that it tended to the proof or disproof of the issue, so as it might be a damage to the plaintiff.

RICHARDSON, Chief Justice, and MYSELF were of this opinion: and although the interrogatory mentions it to be the land in question,

it

it is not shewn how it is in question; and there can be no indictment upon this statute but where it is shewn, that the deposition is upon the matter in question, and conducing to the issue, and the party thereby prejudiced. SHARP'S CASE.

RICHARDSON, *Chief Justice*, said, it is usual in the star-chamber to dismis bills, if it be not shewn what was the issue, and how the perjury conduced thereunto, and how in prejudice of the party.

JONES, *Justice*, doubted whether the indictment were good in respect of this exception; but because it was an odious crime, he wished the defendant to plead not guilty, and to try it; and upon the evidence it would appear whether it were pertinent, and what was the issue which ought to be proved.

But BERKLEY, *Justice*, held it to be good enough; for it would be too prolix to shew the bill and answer, and what was the issue (a): and inasmuch as it is alledged there was a suit betwixt them in chancery, and the interrogatory is, "Whether he knew the land in question?" which shews that the land was in question, and a convenient certainty is mentioned, it sufficeth; otherwise he agreed it was not good.

WHEREFORE it was advised, there being two indictments, he should plead to the one, and so try the truth, and the exception should be saved.

(a) See the 23. Geo. 2. c. 11. as to the form of the indictment, and 2. Geo. 1. c. 8. as to the punishment of perjury.

### Mackaller against Todderick.

CASE 18.

*Cujus Principium ante, Page 337.*

THIS Case was now moved by GYBBS, for the defendant in the writ of error, that the consideration is good; for it is for his solicitation and labour in procuring him to be presented, which in itself is no simony, nor cause to avoid the contract: and admitting it were simony, yet not being an offence at the common law, nor triable by course of the common law (but an offence only made by the canons), it was not punishable at the common law until the statute of 31. Eliz. c. 6.: and therefore in *Michaelmas Term*, 40. & 41. Eliz. in the common pleas (a), it was adjudged, that where an obligation was for the payment of money, and the defendant pleaded it to be made for the performance of a simoniacal contract, and shews how; upon demurrer it was adjudged, that it was merely a spiritual offence, whereof the common law did not take any cognizance, and therefore was no plea to avoid the bond. And in the case of *Taverner v. Smith* (b), in an information on the statute of 31. Eliz. c. 6. it was resolved, that he ought to suppose a corrupt contract, and not a simoniacal contract; for the statute doth not make the obligation and contract for simony to be void, like the 13. Eliz. c. 8. s. 5. of usury (c), and the 23. Hen. 6. c. 10. for sheriffs.

FLETCHER to the contrary. For simony hath always by the law of God and of the land been accounted a great offence: and an *assumpsit* or bond with a condition to pay a sum of money for a simoniacal contract, is accounted against law, and void; as if one

A promise to pay a sum of money in consideration that the plaintiff would procure the defendant to be presented and instituted to a donative, is void. Ante, 337.

1. Roll. Ab. 18. Powel on Cont. 177. 197. Cowp. 39. 4. Bac. Abr. 465. 4. Term Rep. 73.

(a) *Oldbury v. Gregory*, Moor, 564. (b) *Cro. Eliz.* 626. (c) See 12. Ann. c. 12. the old

MACKALLER  
against  
TODDERICK.

should promise another ten pounds to beat such a man, it is void, 2. Hen. 4. 9. An obligation with a condition to save harmless concerning embezzling of a writ and not returning thereof is void, because against law.

RICHARDSON, *Chief Justice*, said, he much doubted thereof; because the promise is, to pay so much for his labour and travail, and not for the presentation. *Et adjournatur.*—*Residuum postea*, page 361.

CASE 19.

The King against George Archbishop of Canterbury and Tho. Pryst.

Trinity Term, 4. Car. 1. Roll 441.

*Quare impedit* to present to a church above the value of 8l. a-year, the incumbent having taken another benefice. Plea confessing the acceptance of the second benefice, and that the church was thereby void, but that the offence was within a general pardon. Replication shewing an exception in the pardon  
Ante, 61.

Hetley, 124.  
Jones, 334.  
2. Will. 174.  
3. Burr. 1504.  
1509.

**Q**UARE IMPEDIT *ad præsentandum ad ecclesiam vicariæ de* ICHINGSTOCK, and makes title by the statute of 21. Hen. 8. c. 13. for that one *Shilston*, being vicar of *Ichingstock* (which was a benefice with cure of souls above the value of eight pounds a-year), in the fifteenth year of king *James* took a second benefice, viz. the vicarage of *Holcomb-Burnel*, in the county of *Devon*, being a benefice with cure; and was thereto admitted, instituted, and inducted, whereby the first benefice became void, and remained void for two years, and so title of presentation accrued to king *James*, and from him descended to the king which now is, and therefore belongs to the king to present.

The archbishop claims nothing but as ordinary.

The defendant *Pryst* pleads, and confesses the king's title from the acceptance of the second benefice, whereby the first was void, and so remained void 21. Jac. 1. and pleads the general pardon of 21. Jac. 1. and that the said *Shilston* was not a person excepted in the pardon, nor the said cause of lapse excepted: and that *John Shilston*, so being incumbent, resigned that benefice of *Ichingstock*, and gave title to *John Fayle* to present; who, upon the said resignation, presented the defendant, who was admitted, instituted, and inducted before the writ of the king, &c.

To this the attorney general replies, shewing the exception in the pardon, wherein is excepted "all titles and actions of *quare impedit*, "others than such actions of *quare impedit* which the king hath or "may have *ratione lapsus* incurred *ultra* three years last past, for or "concerning any benefice whereof any incumbent then was, or the "last day of the parliament should be, in actual possession, by the "presentation of any patron, or the collation of any ordinary;" and that the said church being so void by lapse, *John Fayle* presented, &c.; and traverseth, that the said vicarage of *Ichingstock* *vacavit per resignationem* of the said *John Shilston*. Upon this replication the defendant demurred.

After divers arguments at the bar, and twice argued at the bench in the common pleas, and the Judges being divided both times, viz. RICHARDSON, *Chief Justice*, and HARVEY, *for the plaintiff*, and HUTTON and YELVERTON, *for the defendant*; and afterwards SIR ROBERT HEATH, *Chief Justice* of the common pleas, and HARVEY, *for the plaintiff*, and HUTTON and VERNON, *for the defendant*; by reason of this difference in opinions, it was adjourned into the exchequer chamber, and argued there at the bar; and afterward by



all the Justices of both benches and Barons of the exchequer, viz. by SIR THOMAS RICHARDSON, *Chief Justice* of the king's bench, SIR ROBERT HEATH, *Chief Justice* of the common pleas, SIR HUMPHRY DAVENPORT, *Chief Baron* of the exchequer, and by all the other Justices and Barons; and two main questions were made.

THE KING  
against  
THE ARCH-  
BISHOP OF  
CANTERBURY.

FIRST, If an avoidance of a church happening and continuing void divers years, so as the king hath title to present by lapse, and the king doth not take advantage thereof, but dies, Whether the succeeding king may take advantage of this lapse; or be barred by the statute of 25. *Edw.* 3. c. 1. ? And that rested only upon the exposition of the said statute, the words whereof are, "And touching presentments to be made by the king or his heirs to any benefice in another's right, by *old titles*, the king granteth, that from henceforth he nor any of his heirs shall not take title to present to any benefice in another's right of any time of his progenitors; nor that any prelate is bound to receive, &c.; but that the king and his heirs be for ever hereafter clearly barred of all such presentments, saving always to him and his heirs all such presentments in another's right fallen, or to fall, of all his time, and of the time to come." It was strongly urged at the bar, and also at the bench, by those who argued for the defendant, that this statute extends to all the successors and heirs of king *Edward* the third, that none of them may present to a church in another's right, as they argued that this church is), because the king hath not that title as to this proper advowson, but in right of him who hath the inheritance to any church which falls in time of his progenitors; and the rather, for that in the abridgement of the statutes in the book of the statutes, this saving is altogether omitted; so they conceived, the king was bound by the express words of the statute, and that there is not any such saving. VERNON, *Justice*, continued of this opinion; but HUTTON, who argued in the common pleas for the defendant in this point, that the title of the king was bound by the said statute, and that he might not have title to present to a church fallen in the time of his predecessor, by reason of his title of lapse fallen in the time of his predecessor, now changed his opinion. And all the other JUSTICES AND BARONS, except VERNON, argued for the plaintiff in this point, that the king hath good title to present by lapse incurred in the time of his predecessor, and is not restrained by the 25. *Edw.* 3. c. 1. ; for by the express words of the statute all rights and titles to present in his own time (*viz.*) until before the statute, and in his time after, and all his heirs (*viz.*) after the death of *Edw.* 3. are saved; and it shall not bar the titles which the king had in "another's right, fallen or to fall in his own time, or in the time of his heirs." And that there was such a saving, appeared by the copy out of the parliament roll, and by an ancient book in the exchequer, writ in parchment, where it is writ with a saving: and they held, that these words of "*old titles*," is intended in the time of the progenitors of king *Edward* the third, and not of any titles of presentments to fall in the time of *Edward* the third, or of any of his heirs, but intended to exclude king *Edward* the third and all his

The king's successor may present to a benefice upon a lease to his predecessor.

11. *Hen.* 4. pl. 7.  
Jones, 337.  
3. *Com Dig.*  
199. 201.  
2. *Bl. Com.* 277.

2. Co. 22. a

THE KING  
against  
THE ARCH-  
BISHOP OF  
CANTERBURY.

his heirs from titles of presentation in others right, fallen before the time of king *Edward* the third, whereof any church was full, and which title is only in another's right; and that was the expresse intent of the statute, viz. to take away the statute of 14. *Edw.* 3. c. 2. in this point. And *BERKLEY* and some of the Justices doubted, whether a presentation by lapse shall be said to be in another's right; but only presentments by reason of guardianship and temporalities in the king's hands; but all the other Justices and Barons agreed, that it shall be said to be in another's right; for although he presents *ratione prerogativæ*, yet he presents as in the right of the patron: so it is where one presents by reason of a church being void after forfeiture for alienation without licence, or for outlawry; and for that was cited 14. *Edw.* 3. "*Quare Impedit*," 54. 22. *Hen.* 6. 29. 21. *Eliz.* *Dyer*, 364.: and for the principal point they relied upon 11. *Hen.* 4. 7. where it is so resolved, 7. *Hen.* 4. 25. 18. *Eliz.* *Dyer*, 347. 7. Co. 28. a. and many precedents where the king makes title to present by lapse and title in another's right. Wherefore for this point *RICHARDSON*, Chief Justice, (who argued alone in one day), said, it is to be taken for clear law, that the king hath good title to present; and the declaration was good notwithstanding that objection.

If an incumbent accept a plurality, the church becomes void by the statute of 21. *Hen.* 8. c. 13. and the patron ought to present within 6 months after the avoidance, which he may do without sentence of deprivation, for he is bound to take notice of this avoidance at his peril; but neither the interest of the patron or the king shall be discharged by a general pardon.

4. Co. 75.  
Jones, 3. 7.  
*Dyer*, 237.  
2. Inst. 632.

THE SECOND QUESTION was, If *Shilston* were incumbent and might resign, Whether by his resignation the church is become void? And that rested upon the exposition of the statute of 21. *Jac.* 1. c. 1. of the general pardon, and the statute of 21. *Hen.* 8. c. 13. of pluralities, Whether the church was absolutely void by acceptance of a second benefice, being both with cure: and if the pardon unto him, being in possession, may make him incumbent?

This point was argued strongly in the common pleas by *YELVERTON* and *HUTTON*, and afterwards there by *VERNON* and *HUTTON*, and by both of them in the exchequer chamber, for the defendant, that this church, by the 21. *Hen.* 8. c. 13. was not absolutely void in fact, but is voidable *quoad* the patron, that he may present by the statute; but until he presents, the other remains incumbent; and then he remaining incumbent, and for three years being in possession of the church as incumbent until the pardon of 21. *Jac.* 1. and the pardon then coming, he being in possession, establisheth him in possession, and continues him incumbent; and he cannot afterward be ousted by the king or any other; and then he is incumbent until he resign: and therefore his plea is good, for he is out of the exception of the pardon, for he was in for three years before the pardon; and therefore they said, he remained incumbent; that he might plead as incumbent by the statute of 25. *Edw.* 3. c. 1. as he pleads here: also, he is incumbent as to all strangers, but not as to his patron; for he may present before any deprivation, although a stranger cannot, because the church remains full against him: and he is incumbent so as he may take a release of any annuity issuing out of the parsonage, and is chargeable in an annuity, and is chargeable to the payment of subsidies and fifteenths; and may have an action of debt against any of his parishioners for not setting out their tithes.

tithes; and many other reasons they alledged, and said, that the penning of this statute differs much from the statute of 31. Eliz. c. 6. of Simony, and from the 13. Eliz. c. 12. for not reading of the Articles: wherefore they concluded, that judgment ought to be given for the defendant. But all the other JUSTICES AND BARONS argued against it; for they all held, that the church was absolutely void *in facto et jure* by taking of the second benefice, and THAT by the express words of the 21. Hen. 8. c. 13.: for at the common law, before the said statute, by reason of the canons and constitutions ecclesiastical, the first church was *in jure* void, so as the patron might present thereto if he would; but because it was an ecclesiastical constitution, the patron was not compellable to take notice of that avoidance until deprivation and notice thereof given him, and then after deprivation the church is void *in facto et jure*, and the patron at his peril ought to present. And this appears by the Books 9. Edw. 3. 2. 5. Edw. 3. 9. 10. Edw. 3. 1. 24. Edw. 3. 30. 11. Hen. 4. 37. F. N. B. 34. L. 14. Hen. 7. 28. Now by the 21. Hen. 8. c. 13. it is made absolutely void after admission, institution, and induction; so it is void *facto et jure*, and the patron at his peril ought to take notice thereof and present within the six months, otherwise a lapse incurs. And that it was void to all purposes absolutely, appears by the manner of pleading in this and all other such cases, that by the admission, institution, and induction to the second benefice, *prima ecclesia vacavit de personâ* of the incumbent, *et vacans continuavit*; so the church is absolutely void by the pleading and confession of the defendants. And this appears by the Books since the statute of 21. Hen. 8. that by the acceptance of a second benefice the church is void *facto et jure* *quoad* the patron and all others. Dyer, 347. 4. Co. 75. b. *Holland's Case*, and 4. Co. 79. b. *Digby's Case*, 6. Co. 29. b. *Green's Case*, and Dyer, 377. and Co. Entries, 368. And for the reasons before alledged on the other side, *viz.* that he may plead as incumbent, that is because he is admitted by the writ to be incumbent, and his pleading as incumbent is not contradicted: and for the taking of a release, it is much to be doubted; and if it be good, it is because he is in possession as an intruder, to whom a release may be a discharge of such things: and for his being charged with subsidies, that is because he hath the profits, and therefore reasonable he should bear and pay the charges. And *quoad* his having debt for not setting forth tithes, it was denied by all those who argued on the other side. And as to the pardon of 21. Jac. 1. all the other Justices and Barons held, that the pardon doth not help him: FIRST, Because it is no offence within the body of the act; for it is not any offence or contempt against the king. SECONDLY, Because it never was the intent of the pardon to dispense with pluralities; nor are there any words therein to make him an inebriate, or to make a plenarty of a church which was absolutely void.— And divers of the Justices and the Chief Baron held, that a special pardon after such an absolute avoidance, with words “that he may retain,” or whatsoever other words he may have, cannot make him incumbent. So the general words in the pardon shall not inure to make a dispensation, and the church, being once void, shall not be full without a new presentation, admission, and institution. And for the words in the exception of the general pardon, of “all titles and actions of *quare impedit*, others than

THE KING  
against  
THE ARCH  
BISHOP OF  
CANTERBURY.

Moor, 441.

4. Co. 75. b.

2 Wils. 174.

3. Burr. 1504.

1509.

3. Com. Dig.  
200. 210.

Ass. 356.

4. Com. Dig.

318.

Hob. 167.



THE KING  
against  
THE ARCH-  
BISHOP OF  
CANTERBURY.

" suc titles and actions of *quare impedit* as have incurred by lapse  
" above three years before the first day of this parliament, whereof  
" any incumbent is in actual possession by any presentation or colla-  
" tion, &c. the last parts of this exception do not extend to the  
said *Shilton*; for that extends only to those who are in as incumbents  
(which he is not), and not to those who are in as incumbents by  
usurpation and wrong, which are removable by *quare impedit*, and  
which may not be removed without *quare impedit*. And it was said,  
that since the statute of 21. Hen. 8. there have been divers general  
pardons, and no pluralities were ever conceived to be within them.—  
Wherefore they concluded, that judgment should be given for the  
plaintiff; and it was adjudged accordingly.

CASE 20.

The Earl of Kent against Robert Steward and Scott.

Hilary Term, 8. Car. 1. Roll 235.

If *A.* being  
seised in fee of  
the manors of  
*B.* and *C.* levies  
a fine to *D.* of  
both the ma-  
nors, upon a  
purchase made  
by *D.* of the  
manor of *B.*  
only, intending  
the manor of *C.*  
only as a security  
to the purcha-  
sor, and limits  
the manor of *B.*  
to the use of *D.*  
and his heirs,  
and the manor  
of *C.* to the use  
of *A.* until the  
wife of the said  
*A.* should expel  
the said *D.* his  
heirs, and as-  
signs, and after  
such eviction,  
to the use of *D.*  
his heirs, and  
assigns, until he  
should be satis-  
fied from the  
profits for the  
damages of such  
eviction; this  
is only a contin-  
gent use of the  
manor of *C.* and  
therefore no-  
thing vests in *D.*  
until such evis-  
tion happen.

2 Roll Ab. 792.  
Plowd. 345.

483. Cro. Eliz. 511. Cro. Jac. 591. Co. Lit. 205. 10. Mod. 419.

**TRESPASS.** Upon a special verdict the case was, *Francis Babington*, seised in fee of the manor of *Kingston* in the county of *Nottingham*, and of the manor of *Ashton* in the county of *Derby*, of which manor of *Ashton* the place WHERE is parcel, by fine, 41. Eliz. conveyed the said two manors to *GILBERT, Earl of Shrewsbury* and his wife, to the uses following, viz. of the manor of *Kingston*, to the use of them, their heirs, and assigns; and of the manor of *Ashton*, to the use of the wife of *Francis Babington*, until *Julian*, wife of *Francis Babington*, shall evict and expel the said earl or couplets, their heirs or assigns, their farmors, tenants, or lessees, of or from the manor of *Kingston*, or any parcel thereof; and after such eviction, then to the use of the said earl and his wife, their heirs, and assigns, until they should be satisfied with the profits for their loss.—*Francis Babington*, for money by fine, in *Hilary Term*, 43. Eliz. conveys the manor of *Ashton* to *Sir Thomas Reisbie* and his heirs, to the use of him, his heirs, and assigns. The *Earl of Shrewsbury* and his wife, by fine, in *Trinity Term*, 43. Eliz. conveys the manor of *Kingston* to the use of the *Earl of Kent* and his wife, and the heirs of the *Earl of Kent*. Upon the first of *April*, 17. Jac. 1. *Sir Thomas Reisbie* devised the manor of *Ashton* to *Sir Francis Wortley* and to others for two thousand years. Upon the first of *May*, 17. Jac. 1. *Sir Thomas Reisbie* died seised of the said manor of *Ashton*. Upon the first of *September*, 17. Jac. 1. *Francis Babington* died: after his death, 20. Jac. 1. *Julian*, the wife of *Francis Babington*, evicted from the *Earl of Kent* in dower parcel of the manor of *Kingston* of the value of two hundred pounds *per annum*, and enters. The *Earl of Kent* enters into the manor of *Ashton* upon the defendants, being assignees of the said lease, who re-entered; and he brings this action.

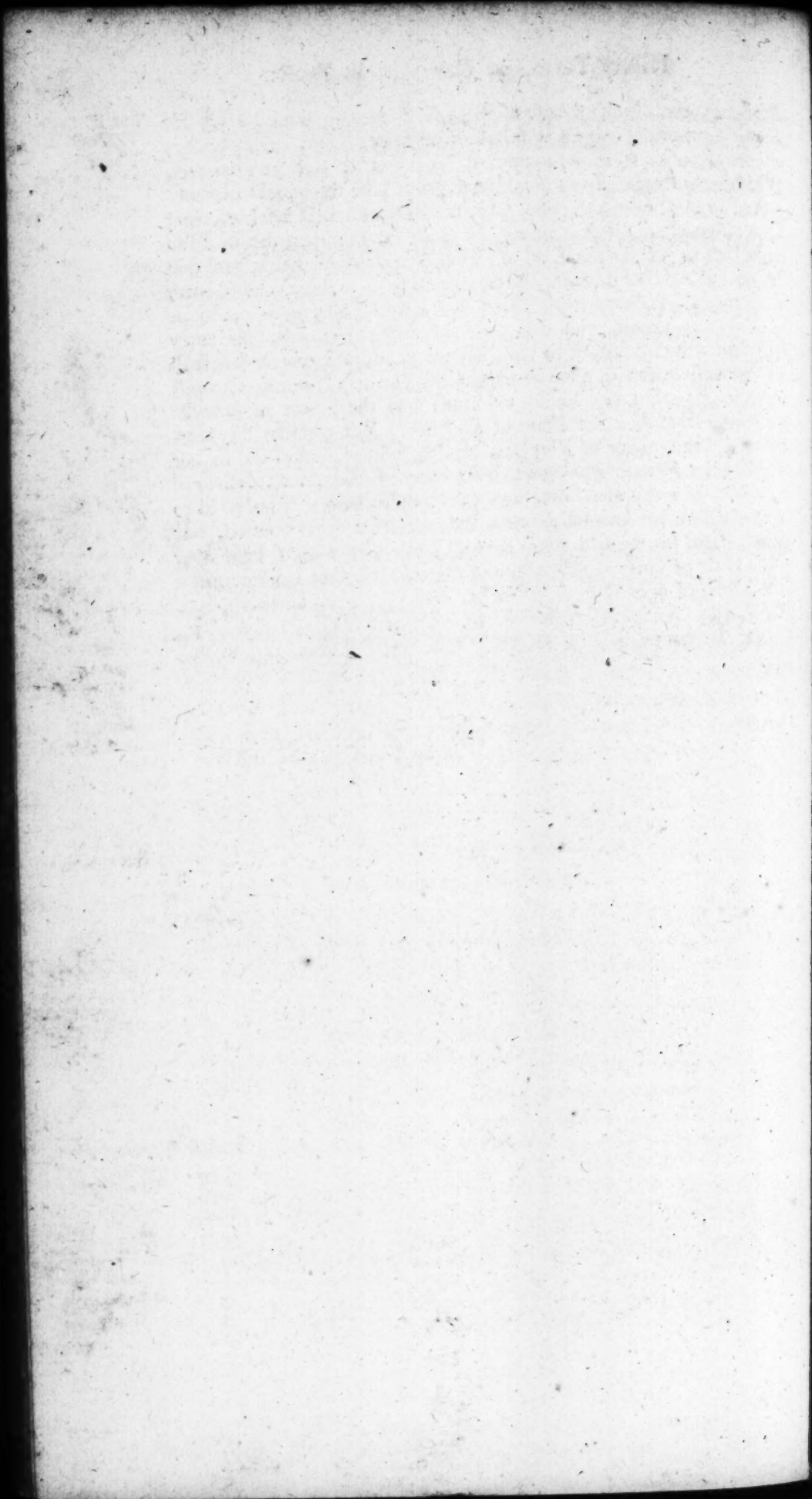
And, Whether this entry be lawful? was the question.

And, after argument divers times, IT WAS ADJUDGED for the defendants, that the entry of the earl was not lawful. The main question was, "the limitation of *Ashton* being to the use of the wife of *Babington* for life, and after to the use of the right heirs of

*Babington*

*Babington*, until the said wife of *Francis Babington* should evict the *Earl of Shrewsbury* and his wife, their heirs or assigns, their farmors or tenants, of or from the manor of *Kingston*, or any part thereof, Whether the *Earl of Kent*, as assignee, may take the benefit thereof? —And in this point ALL THE JUSTICES unanimously resolved, that he as assignee might not enter, but that the use upon the eviction ought first to vest in the *Earl of Shrewsbury* and his heirs, and that this conveyance before the eviction cannot give to him title of entry as assignee; for the words "*heirs and assigns*" are to be taken as words of limitation, viz. that the *Earl of Shrewsbury* by his entry shall have it by limitation to him, his heirs, and assigns; and it shall not first vest in the assignee as purchaser; and it is not such interest which is assignable over before eviction; and the power of entry is not transferred with the estate of *Kingston*. But whether the conveyance of the manor of *Kingston*, and the conveyance of the manor of *Ashton* by *Francis Babington*, before any eviction, hath destroyed the privity of entry after eviction (the estate being transferred to another before the eviction), they did not deliver any opinion; nor agreed. But for the first cause they all agreed, that the *Earl of Kent* hath no title of entry as assignee, and therefore for that cause it ought to be adjudged against him. Vide 1. Co. 135, 136. *Chudley's Case*. Plowd. 483. *Nicholson's Case*. 8. Co. 75. *Lord Stafford's Case*. 10. Co. 51. *Lampet's Case*. 4. Co. 66. 5. Co. 95. Plowd. 345. *Brett's Case*.

THE EARL OF  
KENT  
against  
STEWART and  
SCOTT.



o  
t  
t  
o  
v  
a  
r

A  
to  
n  
w  
a  
d  
Jo  
A

th  
re  
ne  
fu  
V  
to



## Easter Term,

10. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*} *Justices.*William Noy, *Esq. Attorney General.*Sir Richard Sheldon, *Knt. Solicitor General.*

## The King against Bagshaw:

CASE 1.

*Vide Ante, page 347.*

THE issue being joined, Whether there were such a custom as is pleaded? LITTLETON, the Recorder of London, certified, *ore tenus*, that there was not any such custom generally; for he said, that the custom is not, that one brought up as an apprentice in the trade of a goldsmith, cutler, &c. being a freeman of London, by colour thereof may use any other manual trade; but one of a trade who useth buying and selling, may exercise another trade of buying and selling. But this he did not mention in his certificate, but generally, *ore tenus*, certified, that there is no such custom as is pleaded.

A citizen of London cannot exercise a trade of a different species to that in which he was apprentice. Post. 517.

R. 284.

1 Roll. Ab. 579.

2. Com. Dig. 16.

4. Com. Dig. 199.

## Mackaller against Todderick.

CASE 2.

*Ante, Pages 337. 353.*

AND NOW THE COURT was of opinion, that the consideration was illegal, and that the action lies not; for the consideration to have money to procure him to be rector of the church, is a simoniacal contract, and an unlawful act condemned by all laws. And where it was alledged, that simony is such a spiritual thing and such an offence whereof the common law takes not any notice, at leastwise did not before the statute 31. *Eliz. c. 6.* that was denied.

To procure another to be presented to a donative in the king's gift is an illegal consideration] Ante, 219.

Post. 426.

355. Cowp. 39.

Jones, 541. 1. Roll. Ab. 18. 2. *Hen. 4. pl. 9.* 10. Co. 99. 2. *Hen. 5. pl. 10.* Dyer, 355. Cowp. 39.

And see the statute 12. Ann. st. 2. c. 12.

SECONDLY, It was held, that this declaration is not good, for that the promise is to pay him after he is rector; and he shews, that he was rector by his procurement upon this promise, which cannot be; for he never was rector, but a person utterly disabled to be a parson by this simoniacal contract; as in 23. *Eliz.* for not reading of Articles, and in *Vernon's Case* (a) for the buying of offices.—Whereupon it was held to be error, and the judgment was reversed.

Repugnancy in pleading.

(a) Co. Lit. 234. 1. Hawk. P. C. 313. 3. Bac. Ab. 731.

Ward

## CASE 3.

## Ward against Petifer.

If a man hath the grant of the *first grass*, or *prima tonsura*, that grows on the land every year, he may recover it in *ejectment*; for the freehold is in him who hath the *first tonsure*.

Post. 492. 546.

1. Roll. Ab. 829.

Hardres, 330.

1. Lev. 213.

1. Sid. 416.

Dalif. 95.

4 Leon. 43.

Noy. 54.

Co. Lit. 41. b.

3. Com. Dig. 273.

2. Stra. 1120.

2. Bac. Ab. 166.

**EJECTMENT** upon a lease for five years by the vicars choral in *Litchfield*, of parcel of a meadow called the *Parson's Hayn*, in *Chesterton*. Upon not guilty pleaded and evidence to the jury at the bar, the defendant pretended, that the lessors had not the interest of the soil, but that the freehold was in *Sir Edward Peto*, and that the said lessors had only *primam tonsuram* of the said land from the *hayning* until the crop mowed and carried away, for they never had other profit thereof, but that *Sir Edward Peto* had all the profit thereof for the residue of the year; and then an *ejectment* being brought of the land itself, will not lie.

Therefore they endeavoured to prove, that *Sir Edward Peto*, being lord of the said manor, used every year, after the crop taken away, to feed the meadow with cattle, and to take the trees and bushes growing thereupon.

But on the plaintiff's part it was confessed, that they had only the first crop, but that they used to *hayn* it sooner or later at their pleasure, and to keep it longer or shorter time uncut according to the seasonableness of the year, which proves that the freehold was in them who had the first crop.

And ALL THE COURT was of this opinion, that properly, unless other matter be shewn to prove the contrary, the freehold is in him who hath the *first tonsure*, for that is the most beneficial part of the year, and those who have the after-pasture have but the profits in nature of common; but admitting he hath but the first crop, yet they held, that he may well have an *ejectment* thereof. Yet THE COURT advised the jury, that if they conceived the vicars had only the first crop, and not the entire profits through all the year, as the evidence whereby the defendants claim (which was a lease in 29. Hen. 8. whereby he let the rectory and tithes, except the *Parson's Hayn*, which was the land in question, for forty-two years, and after a conveyance of the *Parson's Hayn*, 5. Edw. 6.) imports, then they should find this matter specially, and leave it to the law, Whether an *ejectment* lies in this manner? But if they conceived the entire land for all the year to be appertaining to the vicars, then they may have a general verdict.—And afterwards the jury found a general verdict for the plaintiff.

## CASE 4.

## Goldsmith against Ellen Sydnor, Administratrix of William Sydnor.

Michaelmas Term, 9. Car. 1. Roll.

To debt on a bond against an administratrix, if the defendant plead that there is a statute staple and a judgment yet unpaid, and no assets ultra, the plaintiff

may reply, that there was a defeasance on the statute, and that the defendant hath sufficient to satisfy the plaintiff and the said judgment.—1. Roll. Ab. 925. Stiles, 143. 1. Brownl. 51. 2. Term Rep. 692.

3. Term Rep. 685.

in the common pleas; and that the said *William Sydnor* in his life did not pay the said debt of four hundred pounds, nor any part thereof; and that the said statute remains in force; and that she hath no goods unadministered except to the value of one hundred pounds, which are liable to the execution upon the said statute and judgment; *et hoc parat. est verificare.*

GOLDSMITH  
against  
SYDNOR.

1. Mod. 186.

The plaintiff replies, *quod bene et verum est* that the said *William Sydnor*, by the said recognizance, acknowledged himself bound to the said *Edward Hobert, &c.* but that there was a defeasance betwixt them, that if he had not paid one hundred pounds to one *Edward Leythorp* upon the first of *June 1635*, and should save him harmless, &c. that the said statute should not be forfeited; and that the defendant hath sufficient to satisfy the plaintiff and the said judgment.

The defendant hereupon demurred.

GRIMSTON now argued, that this statute, not being yet forfeited, is not pleadable; and relied upon *Harrison's Case* (a).

In the administration of an intestate's effects, a statute staple shall be paid before a debt on specialty, though the statute is not yet due.

BUT THE COURT, in this point, held, that there is a difference betwixt this case and *Harrison's*, which was a statute with a defeasance for the performance of covenants, which peradventure never should be broken, and therefore it shall be no plea to bar: but here is a statute for the payment of money absolutely at a day certain; which is allowable before debts upon an obligation.

Swinb. 370. 3. Lev. 57. Cro. Jac. 9. 35. Cro. Eliz. 315. 1. Roll. Ab. 952. 1. Com. Dig. 245. 5.

BUT ROLLE, for the plaintiff, then took an exception to the plea in bar, that the pleading of the statute was not good, because it is not said, "*per scriptum suum obligatorium*," nor "*secundum formam statuti*."—ALL THE COURT was of this opinion (b). For this cause, therefore, a rule was given, that judgment should be entered for the plaintiff, unless good cause were shewn, &c.

In pleading a statute staple, it must be said *per scriptum suum obligatorium*, or, *secundum formam statuti*.

Afterward, upon a second motion, judgment should be given for the plaintiff, for this insufficiency and exception to the plea in bar, by RICHARDSON, JONES, and BERKLEY; but I conceived, that the plea being but a plea in bar, and it being mentioned that he acknowledged, if he failed of the payment, the penalty in the statute staple should incur upon him, it cannot be intended but to be a statute acknowledged according to the form of the 23. Hen. 8. c. 6.; and the rather, because it is said, *quod post recognitionem prædictam* such a defeasance was made; so he admits it to be a recognizance. But notwithstanding it was adjudged for the plaintiff.

Ante, 209.  
Moor, S. i.

(a) 5. Co. 28.

(b) Vide 4. Co. 64. Fulwood's Case.

### Boreton against Nichol's and Others.

Easter Term, 7. Car. 1. Roll 115.

CASE 5.

ERROR of a judgment in the common pleas in an ejectment.

The case was, *James Beck*, clerk, was seised in fee of lands in *Boreton-in-Marsh*, being the lands in question; and had issue *Job*, his eldest son, and *James* his second son, and by indenture dated the 5th March, 8. Jac. 1. infeoffs of those tenements *Sir Nicholas*

remainder to the use of the first son begotten of the body of *B.* that should have heirs male of his body, and to his heirs in perpetuum; and in default of such issue of his body, to the use of the first daughter of *B.* which should have issue begotten of her body; and in default of such issue, remainder to the right heirs of *B.* The limitation to the first son gives such first son only an estate tail; and therefore the subsequent remainder to the right heirs of *B.* became vested in him. Post. 401.—Ld. Raym. 209. 3. Com. Dig. 230. 4. Bac. Abr. 314. 1. Peere Wms. 74.

A. makes a feoffment to the use of himself for life, remainder to the use of *B.* for life, male of his body, the first daughter to the use of the first daughter, remainder to the right heirs of *B.*

Overbury



BORETON  
against  
NICHOLLS.

Lit. Rep. 159.  
253. 285. 315.  
344.

Fearne's Essay  
on Con. Rem.  
4th edit. 514.

*Owerbury* and others to the uses in the indenture, viz. to the use of the said *James Beck*, clerk, the father, for his life, without impeachment of waste; and after, to the use of *James Beck* the second son for his life; remainder after his decease to the use of the first son of the said *James Beck* the son which should have issue male of his body, and to his heirs for ever; and for want of such issue, the remainder to the use of the first daughter of the said *Thomas Beck* the son which should have issue of her body, and to her heirs for ever; and for default of such issue, the remainder thereof to the right heirs of the said *Thomas Beck* the son for ever. They find, that *Thomas Beck*, clerk, the father, was seised for life; the remainder to *James Beck* his second son for life; the remainder over, &c. prout; that the said *James Beck*, clerk, the father, died seised, the said *Job Beck* being his son and heir; and that the said *Job* had issue *Henry Beck* the lessor, and died: that the said *James Beck*, son of the said *Henry Beck*, clerk, entered after the death of the father, and had issue *James Beck*; and that the said *James Beck* the grandson died without having issue; and that the said *James Beck* the son, after the death of the said *James Beck* his son, so seised, levied a fine of those tenements *sur cognisance de droit come ceo*, &c. with proclamation, 21. Jac. 1. to *Richard Brett* and *William Wheeler*, who entered by force of the said fine; and the said *Henry Beck*, the son of *Job Beck*, entered upon them, and demised to the plaintiff for years, upon whom the defendant, by the command of the said *Richard Brett* and *William Wheeler*, entered and ousted the said lessee: and that the said *James Beck*, son of the said *James Beck*, clerk, is yet alive. *Et si super totam materiam, &c.*

Upon this verdict, after divers arguments in the common pleas, IT WAS ADJUDGED for the defendants, that this remainder to the younger son, who should have issue, is but a contingent remainder, and a remainder to the right heirs vested in *James* the son; and that his fine is no cause of forfeiture, nor that the said *Henry*, as heir of *Job*, might take advantage of the forfeiture. This judgment being moved by writ of error into the king's bench, it being once argued at the bar, without much difficulty the judgment was this Term affirmed.

1. Co. 66. b.  
Ante, 24.  
Co. Lit. 319. b.  
1. Peere Will.  
70.

## Trinity Term,

10. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

William Noy, *Esq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

} *Justices.*

### Burgess's Case.

CASE 1.

**B**URGESS being outlawed upon an indictment of man-slaughter, in the county of *Middlesex*, brought a writ of error to reverse the outlawry, and assigned for error, That he was over the seas at the time of the outlawry, *viz.* at *UTRICK, in partibus transmarinis*. Hereupon counsel being appointed for the prisoner to plead, and the error assigned, the king's attorney takes issue, that he was here in *Middlesex* at the time of the outlawry, and traverseth his being at *Utrick, prout*. Whereupon issue being joined, and a jury of *Middlesex* at the bar the first day of this Term.

CALTHROP, being assigned of counsel for the prisoner for assignment of error, offered, in evidence a certificate under the seal of the said town.

JONES, *Justice*, moved it as doubtful, whether he might have counsel upon his trial; but all the other Justices held clearly, that he shall have it, when the trial is not upon the fact in the indictment, but upon collateral matter, *viz.* of his being beyond seas.

And ALL THE JUSTICES held, that it is not material in what place beyond seas he was, so as he was over the seas; and that the certificate under the seal of the town where he was resident, without oath of the truth thereof, and one sworn for the exposition of it into *English*, is not allowable; but a witness being sworn, said certainly, that he was there in service at the time of the outlawry and before: whereupon the jury gave their verdicts accordingly; and then he was instantly arraigned upon the indictment, and pleaded &c. (a):

(a) 2. Hawk. P. C. ch. 50. f. 17. 3. Bac. Abr. 777.

On error to reverse an outlawry upon man-slaughter, the person is entitled to the assistance of counsel.

Ante, 134. 147.

2. Jones, 180.

1. Roll. Ab. 571.

9. Co. 31. b.

2. Hawk. P. C.

ch. 50. f. 6. &

ch. 39. f. 5.

Certificate under the seal of the town no evidence of the prisoner's being abroad, except it be proved, and the prisoner identified.

Cro. Jac. 541.

2. Roll. Rep.

346.

### The Case of Langforth Bridge.

CASE 2.

**I**NFORMATION against the inhabitants of the county of *Middlesex* for not repairing of *Langforth Bridge*, which by the information was supposed to be an ancient bridge, and time out of mind had been used to be repaired by the inhabitants of that county.

The defendants, *protestando* that it is not an ancient bridge, for plea say, that it lately was erected by the king for the benefit of his mills.

Information for not repairing an ancient bridge.

The plea must directly answer or traverse that it is not an ancient bridge, and shew who is bound to repair.

To Edw. 4. 5. 12 30. Edw. 3. 14. 32. Aff. 9. 9 Hen. 6. 59. Plowd. 276. Co. Lit. 126. Doc. Plac. 295. Salk. 359. 2. Inst. 701. 6 Mod. 307. 2. Bl. Rep. 685. Burr. 2594. Ld. Raym. 865. 1. Hawk. P. C. 443. Cowp. 111.

Noy,

The CASE of  
LANGFORTH  
BRIDGE.

2. Com. Dig.  
400.

NOY, *the King's Attorney*, hereupon demurred, Because he doth not answer that it was an ancient bridge, but by *protestation*, which being the substance of the information, ought to be specially answered or traversed.

SECONDLY, That the county ought to maintain bridges (a), because they be for the ease and benefit of the people, unless it be shewn who ought to repair them: and to that purpose he cited 10. *Edw. 3. pl. 28.* and an ancient record for *Bow-Bridge*, 8. *Edw. 2.* in this court, that the jury found it was to be repaired by the *Abbey of Dertfort*, and 37. *Affis.* and a record in 5. *Hen. 5.* in the exchequer.

ALL THE COURT thereupon held the plea to be ill; and rule was given, that judgment should be entered for the king, unless, &c.

(a) See 22. *Hen. 8. c. 5.* 1. *Ann. c. 18.* 12. *Geo. 2. c. 19.* and 14. *Geo. 2. c. 33.* 1. *Hawk. P. C. ch. 77.*

CASE 3.

Sir Edward Duncomb's Case.

The owner of the land over which there is an open road may inclose the land; but he must leave a sufficient way, and repair it at his own charge.

Ante, 266.

1. Roll. Ab. 390.

Jones, 296.

22. *Aff. 92.*

1. *Sid. 464.*

2. *Saund. 160.*

Ld. Raym. 1170.

2. *Com. Dig.*

399.

Dougl. 745.

1. *Hawk. P. C.*

367, 368.

Sed vide Burr.

461. to 466.

contra.

SIR EDWARD DUNCOMB being indicted, for that there being an ancient highway in *Batlesdon*, he had inclosed his lands on both sides thereof, whereby he had straitened it, and the way was become *lutosa et foundergsa*, whereas by the law of the land he ought to have made it a sufficient way:

Upon not guilty pleaded, it appeared, on evidence to the jury at the bar, to be a way betwixt two lands ends in the common field, and that it was but four yards wide. But it was proved, that although he had made a causeway reasonably good at his own charge for horsemen, yet carts and coaches might not pass, nor could meet for the straitness thereof, nor might go besides the way. And although it was also proved, that by this charge he had made it better than it was before, yet because he had made the hedges and the inclosure in that manner, he at his peril ought to maintain the way: and whereas before the parish was chargeable with the reparations, now by this inclosure he is bound to repair it and make it a good way, and maintain it at his own charge and peril only.

NOY, *Attorney General*, said, it was so resolved in 6. *Jac. 1.* and 19. *Jac. 1.* upon conference with all the Justices of *England*; which RICHARDSON, *Chief Justice*, affirmed,

CASE 4.

William Seagood against Hone and Alice his Wife.

*Michaehnas Term, 8. Car. 1. Roll 195.*

A surrender to the use of A. and B. and the longest liver of them, and for want of issue of the body of B. the remainder to C. is good, notwithstanding a clause that it shall not be in force till after the death of the

EJECTMENT for lands in *Tuddington* of a lease of *Henry Seagood* for three years. Upon not guilty pleaded, and special verdict, the case was,

*John Reve*, copyholder in fee of the manor of *Tuddington* (where the custom was found to be, that any copyholder might surrender out of court into the hands of two tenants, copyholders of the manor, to the use of any other, surrendered into the hands of two such tenants of the manor the said tenements to the use of *Francis Reve*, and *John Reve* son of the said *Francis*, and of the longest liver of them both: and for want of issue of the said *John Reve* the son, of

Surrenderor. 1. Roll. Ab. 829. 2. Roll. Ab. 61. Co. Copy. 97. Jones, 343. 1. Brownl. 127. Noy, 152. Ld. Raym. 44. 1147. Cro. Eliz. 29. 255. Cro. Jac. 376. 1. *Saund.* 351. March, 177.



his body lawfully begotten, the lands to remain to the younger son of *Mary Seagood*, wife of *William Seagood*; this surrender not to stand and be in full force until after the death of *John Reve*. *John Reve* died, and the surrender was presented at the next court; and *Francis Reve* and *John Reve*, son of the said *Francis*, were admitted tenants to them and the longer liver of them, and to the heirs of the body of the said *John Reve* the son, the remainder to the younger son of the said *Mary Seagood*. They also found, that *Francis*, and after *John Reve* died without issue; and that *Henry Seagood* was the younger son of the said *Mary* at the time of the surrender, who was admitted tenant, and entered and made a lease for three years to the plaintiff; and that the said *Alice*, wife to the defendant, is heir to the said *John Reve*, and entered and ousted the plaintiff: and if, &c.

SEAGOOD  
against  
HONE and his  
WIFE.

THE FIRST QUESTION was upon this clause, "This surrender not to stand and be in full force until after the death of *John Reve*." Whether the surrender be good, and that clause void?—And IT WAS RESOLVED, that the surrender was good; and that clause, being repugnant to the premises, shall be rejected as void and idle, and shall not destroy the premises. Jones, 326.

THE SECOND QUESTION was, Whether upon this surrender *John* had an estate for life only, or an estate to him and his heirs of his body?—And IT WAS RESOLVED, that *John* had but an estate for life; and being an estate for life limited by express limitation, it shall not be an estate to him higher by implication: and although peradventure it might be further enlarged by implication in a devise, yet it shall not be so in a surrender or conveyance; in passing of which the party ought or might have had sufficient counsel to direct him. Wherefore, for the two first points, it was resolved for the plaintiff by the opinion of all the four Justices, A devise to *A.* and *B.* and the longest liver of them, and the want of issue of the body of *B.* the remainder to *C.* conveys an estate for life only. Cro. Jac. 416. 9. Co. 128. a. 2. Term Rep 85.

But for the manner of the finding, JONES doubted whether it should be a sufficient surrender to the use of the plaintiff, because the verdict finds, that it is customary land of the manor of *Tuddington*, and the surrender ought to have been into the hands of two tenants of the manor. But the copy of the surrender found, is in *hæc verba*: "TUDDINGTON." (in the margin) "At the court baron of the honour of *Hampton*, *J. S.* and *J. D.* tenants of the honour of *Hampton*, do present, that *John Reve* did surrender into the hands of the two tenants of the honour, &c." *ut supra*; and that being a court of the honour, and into the hands of the tenants of the honour, is not good.—But all THE OTHER THREE JUSTICES held, it was good enough; for "*Tuddington*" being in the margin, it shall be said a distinct court by itself; for an honour consists of many manors, yet all the courts for the manors are distinguished and have several copyholders; and although there is for all the manors but one court, yet they are *quasi* several and distinct courts: and so it was usually in the time of the abbeyes, that they kept but one court for many manors. Whereupon it was adjudged for the plaintiff. If a lord hath several manors, he may, by custom, hold courts in one of them for all the several manors. 4 Co. 27. a. Co. Lit. 27. a. 58. a. 2 Com. Dig. 503. 534.

## CASE 5.

## Spirt against Bence.

Hilary Term, 8. Car. 1. Roll 246.

On a devise of  
"all my pasture  
lands in D. to  
my youngest son  
Henry, AND  
ALSO all bargains, grants,  
covenants,  
which I have  
from B. my son  
Henry shall en-  
joy and his heirs  
for ever; and  
for lack of heirs  
of his body,  
then to remain  
to my son Francis  
forever;" Henry  
shall have an  
estate for life only,  
and not an estate  
tail of the pas-  
ture by implica-  
tion; for the  
heir cannot be  
disinherited  
without a very  
clear and plain  
intent appears.

S. C. cited in  
Taylor v. Webb,  
Styles, 308.  
Vaugh. 262.  
1. Mod 177.  
2. Bac. Abr. 67.  
Cowp. 234.  
410. 657.  
Douglass. 321.  
759.  
2. Term Rep.  
411.

**E**RROR of a judgment in the common pleas in an ejectment, where, upon a special verdict, the case was, *Thomas Cann*, being seised in fee of divers messuages and lands holden in soccage, and having three sons, *Thomas*, *Francis*, and *Henry*, devised his lands in this manner: "I devise to *Thomas* my lands in *Horton*, to him and his heirs males of his body; remainder to *Francis* and his heirs. ITEM, I give to *Francis* my son my house in *Wickwarr*, to him and to the heirs males of his body; and for lack of such issue, to my son *Henry* and the heirs males of his body. ITEM, I give to my son *Henry* and his heirs freely my house in the borough of *Wickwarr*, in which I dwell. ITEM, I give to my said son *Henry* my house and lands in *Impsteade*. ITEM, I give to him two houses in *Wickwarr*, in the tenure of *J. S.* ITEM, I give to the said *Henry* my pastures called *The South-fields*, and one meadow called *Warbay*, in *Wickwarr* (which are found to be the land in question), yielding the rents and services therefore due. ALSO I will, that all bargains, grants, and covenants which I have from *Nicholas Webb*, my son *Henry* shall enjoy, and his heirs for ever; and for lack of heirs of his body, to remain to my son *Francis* for ever. ITEM, I will, That my wife *Margaret* shall have the use and keeping of my son *Henry*, and of all the premises to him bequeathed, during her natural life, paying to him yearly for his maintenance eight pounds, training him up in learning, and what more of her own pleasure." The jury also find, that *Thomas Cann*, the devisor, died in the year 1576: that the lands called *South-fields* and *Warbay* are the lands mentioned in the declaration; and that they are not parcel of the grants and bargains which *Thomas Cann* had of *Nicholas Webb*: that *Thomas Cann* the son had issue *Thomas Cann* the lessor: that *Henry* entered into the lands in the declaration mentioned, and took the profits thereof, and was seised prout lex, &c.; and that afterwards the said *Henry* took to wife *Elizabeth*; and that in 38. *Eliz.* in the life of *Margaret*, he infeoffed of the lands in question *Richard Lothington* and *George White*, and their heirs, to the use of the said *Henry* and *Elizabeth* his wife, and the heirs of their bodies, and after to the use of the heirs of *Henry*, with warranty to the feoffees and their heirs against all persons: afterward, that *Margaret* died; and then *Henry* died without issue; and the said *Elizabeth* surviving, held herself in, &c.: that *Thomas Cann* the lessor was cousin and heir of the said *Henry*, viz. son of *Thomas Cann*, son and heir of the said *Thomas Cann*, the heir of the devisor, and was of full age of one-and-twenty years at the time of the death of *Henry*: and that afterward the said *Thomas Cann* entered, and made the lease in the declaration mentioned: and that the said *Elizabeth* took to husband the said *Robert Spirt*, who thereupon re-entered; and that the said *Elizabeth* is yet alive. *Et si super totam, &c.*

After divers continuances, judgment in the common pleas was given for the plaintiff; and of this judgment a writ of error was brought, and the error assigned in point of law: and it was argued divers times at the bar, viz. by MAYNARD, MASON, and NOR,

Attorney

*Attorney General, for the plaintiff* in the writ of error, and by *GERMYN, MALLET, and CALTHROP, for the defendant*. And in this Term it was openly argued at the bench two several days, viz. by *BERKLEY and MYSELF* the one day, and by *JONES and RICHARDSON* on another day. Two questions were made and argued.

**SPIRT  
against  
BENCE.**

FIRST, Whether *Henry* hath an estate for life only by this devise in the lands in question, or an estate tail? for if he hath an estate tail, then it is a discontinuance, and judgment ought clearly to be given for the defendant. And it was strongly urged, that the last clause in the devise to *Henry*, where it is devised "to him and his heirs, and for lack of heirs of his body to remain to *Francis* and the heir of his body," extends to all the clauses before, and makes him to have an estate tail in all the lands devised to him. And one special reason offered was, because he devised to *Thomas* and *Francis*, his eldest and second sons, estates of inheritance; so he intended to give as great an estate to his youngest son; for by intendment his affection is equal: also, the word "*Item*" couples them together, that he should have as great estate in quality as the others. And against this point ALL THE FOUR JUSTICES argued and agreed, that *Henry* had but an estate for life in the land in question; and that the last clause, "and for lack of heirs of his body," shall extend only to the lands in that clause, viz. to the bargains and grants; and it is found, that it was not any part of the bargains and grants. They all agreed, that the words in a will which disinherit the heir at the common law ought to have an apparent intent, and not to be ambiguous and doubtful; and that the intent ought to be collected out of the words of the will, and not from any foreign intendment or averment: (a) and therefore when he gave to *Thomas* in tail, and in the second to *Francis* in tail, and in the third to *Henry* in fee, and in the fourth to *Henry* only, not mentioning any estate, the law shall construe it that he shall have it but for life; and that he did not intend a greater estate: and for the word "also," it is no more than the word "and," and shall not extend to the quantity of the estate, but to the clause following, "that he deviseth, &c.:" and for that the Books were relied upon, 5. Co. 16. *Wild's Case*, and *Collier's Case* there. Vide 22. Edw. 3. 16. 7. Edw. 6. *Devise*, 38. 28. Hen. 8. *Dyer*, 1. 34. Edw. 3. *Avowry*, 158. 9. Co. 127. *Sunday's Case*. Wherefore for this point they all agreed, that it was but an estate for life, and concluded with the judgment in the common pleas.

SECONDLY, Whether this warranty (b) be a bar during the life of the wife? It was objected, that it was a warranty which commenced by disseisin, so as it cannot bar; for when *Henry* entered the keeping of *A* and the use of the premises during her natural life; Qu. If *A* has only the guar; or takes an estate for life? Ante, 304.

(a) By 4. Ann. c. 16. s. 21. all warranties made by any tenant for life of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect: AND LIKEWISE all

collateral warranties of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir,



SPIRT  
against  
BENCE.

3. Co. 59. a.  
Cowp. 704.

A devise is made to A. and his heirs for ever, and for lack of heirs of his body, to B. in fee. A. and his wife make a feoffment to the use of themselves in special tail, and after to the use of the heirs of Henry, with warranty to the feoffees and their heirs against all persons. A. died without issue. Q<sup>u</sup>. If this warranty descends, and shall bind during the life of the wife?  
Hob. 27.  
Jones, 200.  
2. Mod. 192.

in the life of *Margaret*, it was a *disseisin* to her, and by consequence to him in reversion. But in this point ALL THE JUSTICES agreed, that it was no warranty which began by *disseisin*: for, first, it is doubtful, Whether the wife had an estate for life, or only the guardianship? And BERKLEY held, that she was only guardian; but the others against him, because the limitation is, she shall have it during her life: but although she hath title by that devise to have an estate for life, yet it is not found that she ever was seised thereof; and therefore it cannot be a *disseisin* to her: also, it is no warranty beginning by *disseisin*, because *Henry* occupied from the death of *Thomas Cann* his grandfather, and entered in 1576; and it is not found that he made any *disseisin*, nor had any such intention at the time of the entry by himself.

THIRDLY, Then the question is, If it be a good warranty and descends, whether it shall bind during the life of the wife? And as to that point RICHARDSON and BERKLEY held, that it was a good warranty and should bind; but JONES and MYSELF argued against it: *First*, Because the warranty never attached in the feoffees, and *cestuy que use* cometh in in the post, and before the warranty attached: and therefore JONES denied the resolution mentioned in *Lincoln College Case (a)*, and said, there was not any such resolution; and relied upon the cases 22. *Aff.* 37. and 29. *Aff.* 34. that he that comes to land in the post, as lord of a villain or lord by escheat, who enter before the warranty attached by descent, shall never have advantage of the warranty, which was not attached at the time of his entry: and upon that reason is *Chudley's Case (b)*; he who hath an estate executed by use, by the statute of 27 *Hen.* 8. c. . shall not have advantage of a warranty by voucher, nor otherwise. *The Second Reason*, Because that the warranty *eodem instanti* it was created is destroyed; for instantly the land returned to the feoffor, and is extinct quoad the reversion clearly, because the reversion is revested in him in a fee as high as he gave it: and it is also determined quoad the husband himself for the present estate; for the warranty hath no essence, or being in him to have benefit by voucher or rebutter; therefore it shall have no essence quoad the wife. And although it should be held that *Lincoln College Case* should be law, yet this differs from that case; for there he who recovered against tenant in tail, obtained a lease with warranty from an ancestor collateral, and made a feoffment to uses, and there the warranty was created, and did extend to the estate before the feoffment: but here the warranty begins with the feoffment to uses; and the feoffee himself may never have benefit thereof by voucher or rebutter, and instantly with the creation is destroyed and therefore compared it to the case in the Year-Books 40. *Edu.* 3. pl. 14. 11. *Hen.* 4. pl. 41. 20. *Hen.* 6. pl. 29. where one makes a feoffment with warranty, and afterward takes again by feoffment, the warranty is determined, because he hath as great an estate as he gave — But RICHARDSON and BERKLEY argued, although the warranty is determined for the inheritance, and shall not bind the husband for the present estate, yet it is good, and shall be continued for the wife

(a) 5. Co. 62. 63.

(b) 1. Co. 125. a.

and therefore *quoad* her estate, shall be said to have continuance; and in proof thereof these cases were urged, 17. *Edw. 3. pl. 47. 39. Edw. 3. pl. 9. 31. Edw. 3. "Voucher," 25.* where the husband made a feoffment with warranty against all persons, and takes back an estate to him and his wife, and to a stranger, and to the right heirs of the husband, the warranty is determined *quoad* the fee simple, but it is *in esse* as to the estate of the wife and *quoad* the stranger. But to these cases it was answered, that they are not like to the case in question, because there the warranty was well created, and vested in the feoffee, and is annexed to his estate, and he was entitled to the benefit of it by *voucher* or *rebutter*; and when he took back the estate, it vested in him as assignee in *the per*, and not in *the post*; which is the reason of the case 31. *Edw. 3.* where a fine was levied with warranty to the conusee, his heirs, and assigns, who renders by the same fine to the conusor and his wife, that she shall have benefit by this warranty by *voucher*, although it returns *eodem instanti*; for the estate is given by the render, and she is in *the per*; but so it is not here. And although it was alledged, that every one coming in of any estate may rebut by the warranty attached upon the land; yet as this case is, because he comes in *the post*, before the warranty attached, he shall not have benefit thereof; and therefore JONES cited a case 7. *Eliz.* in the common pleas, where one made a feoffment with warranty to the use of himself for life, remainder for life, remainder to his right heirs, that it was resolved this warranty should not bind for the remainder to have benefit thereof. *The Third Reason* was made by JONES and MYSELF, that a feoffment with warranty being by tenant for life, to bar the reversion, is not favoured in law; and when it is for the use of himself and his wife, and to the use of his right heirs, the warranty is destroyed *quoad* him who created it, and never by any means may bind him in his life: and when the ancestor is not bound thereby, his heirs may not be bound; as *Litt. sect. 734.* Uncle of tenant in tail, being infeoffed, makes a devise with warranty, which descends upon the issue in tail, it shall not bind, because it is a maxim, that "the heir is not bound where the ancestor is not bound himself;" and to that purpose was cited 31. *Edw. 3. "Grants," 85.* A father binds his heirs where he doth not bind himself, it is void to bind the heir, *Co. Litt. 386. a.* Wherefore for this point, the Court being divided, *adjournatur.*

SPIRT  
against  
BENCE.

Co. Lit. 393. a.

3. Co. 63. a.

Post. 392.

Sir Henry Ferrers's Case.

CASE 6.

SIR HENRY FERRERS, *Baronet*, was indicted by the name of SIR HENRY FERRERS, *Knight*, for the murder of one *Stone*, whom one *Nightingale* feloniously murdered, and that the said *Sir Henry* was present, aiding and abetting, &c. *Sir Henry Ferrers*, being arraigned upon this indictment, said, that he was never knighted; which being confessed, the indictment was held not to be sufficient: wherefore he was indicted *de novo*, by the name of SIR HENRY FERRERS, *Baronet*; and, being arraigned, pleaded *not guilty*, and was tried at the bar.

The addition of *Knight* instead of *Baronet* to the name of a defendant is fatal to an indictment, and may be pleaded in abatement. Ante, 102.

Jones, 346.

Cro. Jac. 482. 1. Vent. 154. 6. Mod. 105. 10. Mod. 28; 116. 850. 2. Hawk. P. C. 328. Co. Lit. 16. b. note (8).

Ld. Ray. 303. 309. 1014. Stra.

Upon

If an officer be killed in attempting to arrest *A. B. Baronet*, under a warrant against *A. B. knight*, it is manslaughter only.

*r. Jones*, 346.  
9. Co. 68. 2.  
1. Cro. Jac. 280.  
1. Lev. 91.  
Foster, 313.  
1. d. Ray. 1296.  
1. Hale, P. C.  
457. 460.

Upon the evidence it appeared, that he was arrested for debt, and that *Nightingale* his servant, in seeking to rescue him, as was pretended, killed the said *Stone*.—But because the warrant to arrest him was by the name of *HENRY FERRERS, knight*, and he never was a knight, it was held by ALL THE COURT, that it was a variance in an essential part of the name, and they had no authority by that warrant to arrest *SIR HENRY FERRERS, Baronet*; so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder, because no good warrant.

But upon the evidence it appeared clearly, that *Sir Henry Ferrers* upon the arrest obeyed, and was put into an house before the fighting betwixt the officer and his servant; wherefore he was found “not guilty” of the murder and manslaughter.

1. Hawk. P. C. 130. Cases in Crown Law, 2d Edit. 106. 188.

## CASE 7.

## Dorchester against Webb.

Michaelmas Term, 9. Car. 1. Roll 373.

If the obligee of a joint and several bond make the executor of one of the obligors his executor, this does not release the other obligor; and such executor, if he have no assets of the deceased obligee in his hands, may maintain an action of debt on the bond against the surviving obligors. Post. 551.

**D**EBT, by *Anne Dorchester*, executrix of *Anne Rowe*, upon an obligation of 260l. by *William Webb*.

The defendant pleaded, that *John Dorchester*, late husband to *Anne*, and the said *William Webb* were obliged in their bond, jointly and severally, to the said *Anne Rowe*; and that the said *John Dorchester* died, and made the said *Anne* his wife, the now plaintiff, and the said *Anne Rowe* the obligee, his executrixes; and that the said *Anne Rowe* renounced, and the said *Anne Dorchester* administered, and that assets to pay the said debt came to the plaintiff; *et hoc, &c.*

The plaintiff confesseth the will of *John Dorchester*, and that the said *Anne Rowe* renounced, and that the said *Anne Dorchester* fully administered all the goods of *John Dorchester*; and after the said *Anne Rowe* made the plaintiff her executrix; and that neither at the death of the said *Anne Rowe*, *nec unquam postea*, any goods of the said *John Dorchester* came to the hands of the plaintiff.

The defendant upon this demurred.

*S. C. Jones*, 345.  
*S. C. Holt* 128.  
1. Roll. Ab. 929.  
934.  
Moor, 855.  
Cro. Eliz. 114.  
150. 161.  
Hob. 10.  
Co. Lit. 264.  
364. b.  
Plowd. 186.  
1. Sid. 97. 448.  
Yelv. 160.  
1. Salk. 303, 306.  
Carth. 513.  
1. Leon. 320.  
2. Lev. 73.  
Cases Temp.  
Falb. 240.  
3. Stra. 865.  
3. Term Rep. 557.

*SIR JOHN BANKS* and *GRIMSTON* argued for the defendant, and *CALTHROP* and *SERJEANT WARD* for the plaintiff. And the defendant much insisted, that when the obligee makes the obligor his executor, it is a release in law of the debt; and so it is when he makes one of the obligors his executor; for a release to one is a release to both; and by the same reason, when the obligee makes the executor of one of the obligors, who is chargeable to that debt, his executor, it is a release in law of that debt, for he may not sue himself nor his companion; and although it be pleaded, that he fully administered the goods of *John Dorchester*, yet that is not material, nor alters the case, for she remains always the executrix of *John Dorchester*, and may have the goods of the said *John Dorchester*; and for that purpose cited *Mary Shipley's Case*, 8. Co. 134. that if an executrix pleads *plene administravit*, the plaintiff may take judgment presently, and expect when she hath assets.

*Fitzg.* 126. 2. Lac. Abr. 381. 3. Bac. Ab. 699. *Ld. Raym.* 605. 2. *Saund.* 226.

But



But JONES, BERKLEY, and MYSELF (RICHARDSON being absent), agreed, that the defendant hath no cause of demurrer, but that judgment shall be given for the plaintiff. FIRST, we agreed, that when the debtee makes the debtor his executor, it is not absolutely a discharge of the debt, for the debt remains as *assets* in the hands of the debtor executor, and is *quasi* a release in law, because he cannot be sued; but it is a mere suspension of the action where a *debtee* takes the *debtor* to husband; or if a man debtee takes the debtor to wife, that is a release in law, because they may not be sued, and personal actions once suspended are perpetually suspended; but where the *executor* of the *debtor* is made executor of the *debtee*, he hath nothing thereby in his own right, but is only to use an action in the right of another: and although she be executrix of *John Dorchester*, yet when she hath fully administered all the estate of the said *John Dorchester* before she be made executrix to *Anne Rowe*, she hath in a manner discharged herself of being executrix to *John Dorchester*, and hath not any thing of his estate.

And they denied the law to be as it is cited in *Shepley's Case* (a), that if an executor pleads *plene administravit*, the plaintiff may pray judgment against him when *assets* come to him; but the plaintiff is not to be barred if he acknowledge it; and if he deny that he hath not fully administered, which is found against him, he shall be barred, and pay costs to the defendant. The difference is, when it is found, that the defendant hath some *assets*, although of little value, as he hath not fully administered, the plaintiff shall have judgment for the intire debt, but he shall not have execution but of as much as is found, and shall not be barred for the residue; and if more *assets* come afterwards, he may have a *scire facias* to have execution thereof: but if it be found, that he hath fully administered, or if it be so pleaded and confessed, the judgment shall be against the plaintiff; and so are all the precedents: wherefore here, she having fully administered all the goods of *John Dorchester*, and not being chargeable to that debt as executrix to *John Dorchester*, she as executrix of the said *Anne Rowe* may maintain this action against the said *Webb* the other obligor. Wherefore it was adjudged for the plaintiff.

8. Edw. 4. pl. 3. 20. Edw. 4. pl. 17. 21. Edw. 4. pl. 81. 1. Hen. 7. pl. 31. 11. Hen. 4. pl. 83. 11. Hen. 7. pl. 4. 8. Co. 1. Sid. 448. 1. Ventris, 94. 3. Term Rep. 685. 1. Roll. Ab. 934. 2. Saund. 216. 2. Hob. 199. 1. Cro. Eliz. 318. 46. Edw. 3. 9. Moor, 246. 1. Leon. 68. 8. Co. 53. 468. R. 404. 467. Ante, 167. for the entire debt; execution for *assets* found; and a *scire facias* for the residue.

(a) 8. Co. 134. Godolph 193.

### Sir William Waller's Case.

CASE 8.

SIR WILLIAM WALLER was indicted, For that he, in the palace of *Westminster*, near THE GREAT HALL, the Justices in the king's bench, chancery, and common pleas, judicially sitting to hear causes, made an assault and affray upon *Sir Thomas Reynolds*, and beat him, in disturbance of the law and contempt to the king, and being upon this arraigned, he was found guilty. He is to be punished by indictment, fine, and imprisonment, but not the loss of hand, by 33. Hen. 8.

110. CAR.

B b

But

SIR WILLIAM  
WALLER'S  
CASE.

Cro. Eliz. 405.

W. Jones, 373.

Owen, 120.

3 Inst. 142.

Moor, 819.

1. Hawk. P. C.

88.

4. Bl. Com. 125.

3. Term Rep.

739.

But because the indictment was not, that he did it in the presence of the Justices, nor in the presence of the king, ALL THE JUDGES agreed, that the judgment of the cutting off his hand should not be given; and so, *seriatim*, they delivered their opinions.

But because this offence was in the palace near the hall door, whereby tumults might have been made, and because it was found to be done sitting all the Courts, and in disturbance of justice and the law, and in contempt to the king, THE COURT awarded, that he should be imprisoned for the said offence during the king's pleasure, and should pay one thousand pounds fine, by the opinion of RICHARDSON, *Chief Justice*, JONES, and BERKLEY: and JONES and BERKLEY would have parcel of the judgment to have been, that he should make his submission in all the courts of the king's bench, chancery, and common pleas, because the offence was made to the said courts.

But RICHARDSON, *Chief Justice*, and I did not agree thereto, because there never was any such judgment before; and for the fine, I conceived that five hundred pounds was sufficient; and it was awarded, that he should be bound with sureties to his good behaviour. *Vide* 22. Edw. 3. pl. 13. 39. Aff. 1. 19. Edw. 3. "Judgment," 17. 41. Edw. 3. "Corone," 280. 42. Aff. 18. 41. Aff. 25. Dyer, 188. Stanford, fol. 38. Trin. 19. Edw. 3. roll 55. Carus' Case. 37. Eliz. Striking at the court of wards stairs, only imprisonment and fine. Hil. 17. Eliz. roll 6. *inter placita reg.* THOMAS JOANS indicted for murder, *apud* LE New Palace, Westminster, 24. January, ann. 17. Eliz. *cognovit judicium, manus amputatur*; but it is not expressed *sedente curia*.

Michaelmas

# Michaelmas Term,

10. Car. I. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

} *Justices.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

## Memorandum.

CASE I.

IN the vacation, viz. in August 1634, WILLIAM NOX, *Attorney General*, died at his house in Brainford, in the county of *Mid-*  
*delex.*

The death of  
Nov. Att. Gen.

SIR EDWARD COKE (who was Attorney General to *Queen Elizabeth* and to *King James*, and afterwards Chief Justice of the common pleas, and then Chief Justice of the king's bench, and in 14. Jac. I. discharged of that place), died at his house in Stoke in the county of *Bucks*, in September 1634, being a prudent, grave, and learned man in the common laws of this realm, and of a pious and virtuous life. He died in the eighty-second year of his age.

The death of  
SIR EDWARD  
COKE.

In the same vacation, viz. 14 September, the king at *Hampton Court* discharged and removed SIR ROBERT HEATH from his place of Chief Justice of the common pleas.

SIR R. HEATH  
removed.

Ante, 52. 65.  
Cro. Jac. 407.

Within two days after he appointed SIR JOHN FINCH, of *Gray's Inn*, who was of the king's learned counsel, and attorney to *Henrietta-Maria* the queen, to be Serjeant at law, and Chief Justice of the said court; who the first day of this Term came unto the chancery bar, where, after a speech made by *Lord Coventry*, keeper of the great seal, and his answer thereunto, was sworn Serjeant at law; and upon Monday (being the *essoigns of Quindena Mich.*) appeared at the common pleas bar, clad and attired in his party-coloured robes and habiliments of a Serjeant at law, and counted upon a writ of right, *de præcipe in capite*, brought by the said queen against *Henry Earl of Holland*, Chief Justice and Justice in Eyre of all the king's forests, chases, parks, and warrens *citra Trent*, and Steward of all the queen's courts, &c.

SIR JOHN  
FINCH created  
Serjeant, and  
made Chief  
Justice of the  
common pleas.  
Jones, 350.

The said SIR JOHN FINCH gave rings, the inscription of which was, "*Rosa et lilia dant purpuram*," and kept his feast; and the next day, being Thursday the 16 of October, was sworn Chief Justice of the common pleas; and upon the Saturday following arrayed in his judge's robes, and accompanied by the *Earls of Dorset, Holland, Newport*, and forty other of nobles, knights, and esquires (the society of *Gray's Inn*, and inns of chancery, and officers of the court attending him), was so brought into the said court.

The Chief Jus-  
tice gives rings  
with the motto  
"Rosa et lilia  
dant purpuram."  
"ram."

SIR ROBERT HEATH appeared at the common-pleas bar the first day of this Term, and, being in his place of junior Serjeant at law, pleaded for his clients as Serjeant at law; which was done by the king's special command upon his humble petition to his majesty, by advice of the lords of his council, granted him leave to practise there, and in all other his courts at *Westminster* excepting the chamber only.

SIR R. HEATH  
returns, by the  
king's permis-  
sion, to the  
practice of the  
bar.



The appointments of *Banks* and *Littleton* to the offices of Attorney and Solicitor General, and *Sheldon* receives a patent of precedence.

And in the vacation *SIR JOHN BANKS*, Reader of *Gray's Inn*, and the Prince's Attorney, was sworn Attorney General, and *SIR RICHARD SHELDON*, the King's Solicitor, resigned up his place, having obtained a new patent to be one of the king's learned counsel, with the same fee he had before, viz. seventy pounds *per annum*, and with a privy seal to have precedence before the King's Solicitor. And *EDWARD LITTLETON*, of the *Inner Temple*, RECORDER of *London*, was made the King's Solicitor.

## CASE 2.

## Tylle against Peirce.

Easter Term, 10. Car. 1. Roll 306.

If a man agree, upon his marriage, that his wife shall dispose of money by her will, a disposal by writing in the nature of a will is good.

Ante, 220.

Post. 597.

2 Danv. 517.

Cro. Eliz. 27.

Moor, 339.

2. And. 92.

1. Roll. Ab. 608.

912.

1 Ventris, 280.

Hob. 17. 312.

1. Mod. 211.

2. Mod. 172.

10. Mod. 221.

1. Vern. 408.

244.

2. Vern. 329.

2 Peere Wms.

82.

Preced. Chan.

41. 84. 255.

Stra. 891. IIII.

IIII.

2. Bl. Com. 498.

2. Com. Dig.

156. 158.

4 Com. Dig.

413.

**D**EBT upon an obligation of six hundred pounds, conditioned, Whereas the defendant was to espouse *A. S.* a widow; if the marriage took effect, and he should survive the said *A. S.* that if within three months after his decease there were paid to the said obligees three hundred pounds to and for such uses and purposes as the said *A. S.* by any writing under her hand and seal subscribed and published in the presence of two witnesses, should nominate, declare, and appoint, then, &c.

The defendant pleaded, that she did not limit, declare, or appoint any use or purpose for the employment of that money.

The plaintiff replies, that she, by her will in writing, sealed and published by her in the presence of two witnesses (naming their names), did thereby will and appoint such sums to be paid, and that the defendant had not paid them.

The defendant thereupon demurred.

**ROLLE**, for the defendant, now shewed the cause, For that she ought to have made a deed in writing, and not a will: FIRST, Because it was not to have any effect until after her death, and it was ambulatory and revocable, and a *feme covert* may not make any will.

BUT THE COURT (*JONES* being absent) held, that this declaration was good; for although a *feme covert* may not make a will without her husband's assent, yet that declaration in form of a will is good enough.

*RICHARDSON*, Chief Justice, thereupon cited a case to be adjudged in the common pleas when he was Chief Justice there, upon a conveyance, wherein was A PROVISIO, that one might revoke the uses by writing under his hand and seal, that a revocation by will under his hand and seal was adjudged a good revocation.

And although the pleading was here, that the said *A. S.* "*volens et devisavit*," and not that it was "*appointed*" by her, yet THE COURT held it to be well enough; for it is not properly a will, being made by a *feme covert*, but a writing in nature of a will. Wherefore the rule was given, that judgment should be entered for the plaintiff unless other cause, &c.

## CASE 3.

## Holmes's Case.

The offence of arson may be committed by wilfully setting fire to one's own house, provided another, it is not

**W**ILLIAM HOLMES was indicted in *London*, For that in April, 7. Car. 1. being possessed of an house in *London*, *Throgmorton-street*, in such a ward, for six years, remainder to *John* for three years, the reversion to the corporation of *Haberdashers*, the house of another be thereby burned; but if no mischief be done to the Lord's felony, though the fire was kindled with that intent.

see: he *vi et armis*, 3. April, 7. Car. 1. the said house "*felonicè, voluntariè, et malitiosè, igne combussit, eâ intentione, ad eandem domum mansionalem, nec non diversas alias domos mansionales diversorum lig-  
orum domini regis; adtunc et idem situat. et existent. ad dictum domum mansionalem dicti WILLIELMI HOLMES contiguè adjacent. adtunc et ibidem felonice, voluntariè, et malitiosè totaliter comburendo et igne consumendo contra pacem.*"

HOLMES'S  
CASE.

Upon his being arraigned at Newgate, he was found guilty; but before judgment this indictment was removed by *certiorari* into this court. It was argued at the bar by GRIMSTON, that it was not felony; and now this Term at the bench,

And, by RICHARDSON, Chief Justice, JONES, and BERKLEY, it was held, that it was not felony to burn a house whereof he is in possession by virtue of a lease for years; for they said, that burning of houses is not felony, unless that they are *ædes alienæ*: and therefore BRITTON (a), BRACTON (b), and THE BOOK ASSIZE (c), mention, that it is felony to burn the house of another; and IO. Edw. 4. pl. 14. 3. Hen. 7. pl. 10. 10. Hen. 7. pl. 1. and Poulters' Case (d), which say, that burning of houses generally is felony, are to be intended *de ædibus alienis, et non propriis*: and although the indictment be "*eâ intentione ad comburendum felonice, voluntariè, et malitiosè,*" the houses of divers others "*contiguè adjacentes,*" yet intent only without fact is not felony. Also BERKLEY and JONES, Justices, held, that it cannot be said to be *vi et armis*, when it is in his own possession.

JONES, Justice, also said, that he could not be well indicted of felony, because none of their names are mentioned who were the owners of the houses adjoining. But to that objection BERKLEY and RICHARDSON agreed not.

Cases in Crown Law,

But I argued, that the burning in the indictment mentioned is felony, because it is *capitale crimen, felleo animo perpetratum*, which is the definition of felony in Co. Lit. 391. a. Also by the rule in BRACTON, 146. "*quod incendium nequiter, et ob inimicitias, factum capitali poenâ puniatur: si vero sit incendium fortuito vel per negligentiam, et non malâ conscientiâ, non sic punietur; sed versus eum criminaliter agatur.*" And it cannot be said to be by negligence in another's house; wherefore it is to be intended in his own house. Also this burning is found to be *malitiosè*; so it is *malâ conscientiâ et nequiter factum*. Also this burning of his house in a street of the city adjoining to the houses of others, is to the endangering of the city, and therefore ought to be construed to be felony; but so peradventure is not the burning of his house in the fields. And whereas it was said, that the intention cannot make a felony, it was answered, that the intention here is coupled with an act of burning, and with the intendment of an act which is felony; as 5. Hen. 7. pl. 18. 7. Hen. 7. pl. 42. 13. Edw. 4. pl. 9. where a man delivers goods to one, and afterwards he that delivered them privately steals them, to the intent to charge him, it is felony. And whereas it was objected, that being his own possession, it cannot be said *vi et armis*; I answered, that *vi et armis* is well enough, where there is a malfeasance, as

2. Inst. 188.  
3. Inst. 66, 67.  
Sum. 85.  
Bro. Cor. 225.  
1. Jones, 351.  
S. P. C. 36. 126.  
4. Co. 20.  
4. Bl. Com. 222.  
Foster, 116.  
1. Hawk. P. C. 166.  
Cases in Crown Law, 2d edit. 193. 195. 209.

In *arson*, the name of the person whose house is burnt must be stated. 2d edit. 209.

The wilfully setting fire to a man's own house in a town is a high misdemeanour, and punishable by fine, imprisonment, pillory, and perpetual sureties for good behaviour.

1. Hale P. C. 563.  
1. Hawk. P. C. 166.  
4. Bl. Com. 221.  
Foster, 116.

(a) p. 16. (b) p. 146. (c) 27. Assize, pl. 44. (d) 11. Co. 29.

HOLMES'S  
CASE.

Ante, 325.  
Poph. 206  
2. Hawk. P. C.  
343, 344.

it is in an action upon the case, 9. Co. 50. b. Also every indictment is *vi et armis et contra pacem*, where an act is done against the commonwealth: so it is where a servant runs away with goods committed to his trust above forty shillings, although properly it cannot be said to be *vi et armis*, because they were in his custody. And in this case the ill consequence which might have fallen out by this act makes the offence the greater; and THE YEAR-BOOKS in 10. Edw. 4. pl. 14. 3. Hen. 7, pl. 10. 11. Hen. 7. pl. 1. and Stanford, 36. 11. Co. 29. 4. Co. 20. a. put the case of burning of houses generally, and not of the burning of other men's houses: and it is an equal mischief in a commonwealth to burn his own in a city or vill as to burn the houses of others, for the dangers which may ensue.

4. Bl. Com. 221.

But THE OTHER THREE JUSTICES resolved *ut supra*, that it was not felony; wherefore he was discharged thereof.

On a special verdict for *arson*, if it be found no *felony*, yet the party may be fined for the *trespass*.

*Sed vide Cro.*  
Jac. 497.

Kely, 29. and 2.  
only for *trespass*.

But because it was an exorbitant offence, and found, they ordered, that he should be fined 500l. to the king, and imprisoned during the king's pleasure, and should stand upon the pillory, with a paper upon his head signifying the offence, at *Westminster* and at *Cheapside*, upon the market-day, and in the place where he committed the offence, and should be bound with good sureties to his good behaviour during life.

Hale P. C. 172. where Lord Hale doubts the propriety of this point of the case, because being tried for *felony*, the prisoner hath not those advantages for his defence as if he were indicted only for *trespass*. And see 2. Hawk. P. C. 615. 2 Str. 1137. and Cases in Crown Law, 2d edit. 15.

## CASE 4.

## Robodham against Venleck.

In slander, when the introductory matter is sufficiently shewn, an *innuendo* may explain the doubtful words.  
Ante, 192.

**A**CTION FOR WORDS. Whereas the plaintiff exhibited in the king's bench articles of the good behaviour against the defendant, and made oath before JUSTICE WHITLOCK, one of the Justices of the said court, of the truth of them, that the defendant spake these words of the plaintiff: "He (*innuendo* the plaintiff) made a false oath (*innuendo* the oath aforesaid) before the Judge, *innuendo* the said Justice); and I have that in my house that can prove it."

After not guilty, and found for the plaintiff, it was moved by BALL, that for these words an action lies not; because he doth not shew there was any speech of the plaintiff *before*, nor of that oath: also he doth not shew it to be a false oath taken in any court.

Ante, 177.  
1. Roll. Ab. 39.  
1. d. Ray. 260.  
Cowp. 276.  
1. Term Rep. 70.

But (*absente* RICHARDSON) JONES, BERKLEY, and MYSELF held, that the action well lies; for when it is alledged to be spoken *falsely of the plaintiff*, that is sufficient, without shewing there was any speech of him. And when it was shewed that articles for the good behaviour were exhibited in the king's bench, and he sworn to the truth of them before JUSTICE WHITLOCK, and he affirmed that this oath is false, this is a scandalous speech, and charges him with perjury: for it is an oath taken in a court of record: and it is not like to the case alledged, that "thou wert forsworn in *White church court* (*a*);" for this Court hath no cognizance that *White church* is a court of record. And here, when the defendant hath pleaded not guilty, and is found guilty, that ascertains the Court he spake those words of the plaintiff, and concerning that oath. Wherefore it was adjudged for the plaintiff.

(a) Skinner v.  
Trobe, Cro.  
Jac. 190.

Merric



Merrick *against* The Hundred of Rapesgate, in the County of Gloucester. CASE 5.

Easter Term, 10. Car. 1. Roll 233.

**E**RROR of a judgment in the common pleas, For that the plaintiff had brought his action against the hundred upon the statute of *Winton*, 13. *Edw.* 2. ft. 2. c. 1. of HUE AND CRY, and the statute of 27. *Eliz.* c. 18.: and counts, that he was robbed in S. in a certain place called the Highway, leading from *L.* unto *Gloucester*, of such a sum by persons unknown; and that he made HUE AND CRY at *Cotesford*, in the said county, near to the said place where he was robbed, and gave notice of the said robbery to the inhabitants of *Cotesford* aforesaid: and that he was sworn accordingly before such a justice of the peace that he was robbed of such a sum, and did not know any of the parties.

The notice required by the statutes of HUE AND CRY is not confined to the hundred or the county in which the robbery was committed. Ante, 41. Show. 94.

Upon not guilty pleaded, and found for the plaintiff in the common pleas, and judgment there, error was brought and assigned by

SIR JOHN BANKS, *Attorney General*, Because he doth not alledge that *Cotesford* was a vill within the hundred, so as notice was given to the inhabitants within the hundred where the robbery was committed: for to give it to any of the vills of another hundred, is not within the intention of the statute; for they will not regard it, because they will not be charged with the loss.

But ALL THE JUSTICES held, that it is not material it should be given to those of the hundred, but to the inhabitants of the vill near adjoining to the place where the robbery was committed; for the words of the statute do not mention, that notice shall be given to the inhabitants of the hundred.

HENDEN, *Serjeant*, said, it hath been adjudged, that HUE AND CRY made, and notice given to the inhabitants of the villages near adjoining to the place where the robbery was done, although it be out of the hundred and county, was good enough.

But ALL THE JUSTICES doubted thereof, if out of the county: Ante, 41. but although it were in a place in another hundred it were well enough; for by intendment the party robbed cannot know the division of the hundreds; but he ought at his peril to make it in a village near adjoining to the place where he was robbed. Whereupon the judgment was affirmed.

CRAWLEY, *Justice*, said, that in the common pleas, in an action against the hundred of *Daccorn* (a), upon a special verdict, it was adjudged, that HUE AND CRY made in the next vill adjoining, although it were in another county, was adjudged good.

(a) *Tutter v. Dacorum*, ante, 41. See 8. Geo. 2 c. 16. Dougl. 465.

Stevens *against* Faucon.

CASE 6.

Hilary Term, 9. Car. 1. Roll 1052.

**E**RROR of a judgment in the common pleas in *quare impedit*. *Faucon* had brought a *quare impedit* against *GEORGE* late *Archbishop of Canterbury* and the said *Stevens* for the church of *Newington*, in the county of *Surry*, where the plaintiff entitled himself by grant to the next avoidance, and alledge that the former incumbent was presented, admitted, instituted, and inducted, and the defendant do not traverse the induction, a REPLEADER shall be awarded. Cowp. 510. Dougl. 396. 797.

In *quare impedit*, if the plaintiff entitle himself to the next avoidance, and the defendant

of

STEVENS  
against  
FAUCON.

of the next avoidance; and that one *Tobias Crisp* was presented, admitted, instituted, and inducted thereto, and that the said church became void, by the acceptance of a second benefice above value. The archbishop pleaded a plea thereunto; whereupon it was demurred. *Stevens* pleaded a plea, and traverseth, that the said *Tobias Crisp* was admitted and instituted therein; and upon this they were at issue, and a writ awarded to the archbishop for that trial: but afterwards, upon consideration of the said plea of *Stevens*, it was adjudged an ill plea, and *repleader* was awarded; because the induction, being alledged, ought also to have been traversed.

In *quare impedit*, if the ordinary die after verdict, and before the day in bank, the proceeding shall stay as against him.

The defendant therefore amended his plea, and traversed the admission, institution, and induction; and issue was joined thereupon, and tried for the plaintiff. And after divers continuances and days *in banco*, the plaintiff shewed, that the archbishop was dead since the last continuance, and prayed that there might be no further proceedings as against him, and to have judgment against the defendant *Stevens* upon the verdict; which was granted him.

And now error brought.

A *repleader* shall be awarded where the mispleading alters the mode of trial.

Flow 529.

Cowp. 510.

If *quare impedit*, on a surmise that the bishop died after last continuance, judgment may be entered against the other defendant only. Ante, 236.

THE FIRST ERROR assigned was, That the repleading was not well awarded; for the issue which was joined before the writ awarded to the archbishop was well enough, and needed not any repleader.—But ALL THE COURT here held, that the repleader was well awarded: for the induction being alledged as well as the institution, there ought to be a traverse to it; which alters the course of the trial, as 22. Hen. 6. 27. and 2. Hen. 4. 17. are; so it shall be tried *per pais*.

THE SECOND ERROR assigned was, That where the allegation was that the archbishop was dead, and the judgment *ideo consideratum fuit* that he should recover only against the said *Stevens*, &c. it was not good, because it is not entered, *Et quia "le dit STEVENS," hoc non didicit, ideo consideratum est, &c.*; for until the other party confess or deny it, upon a surmise only of the part of the plaintiff, without the defendant's joining, the Court ought not to give judgment: wherefore for this cause it is erroneous.—But ALL THE COURT held, that it was well enough; for the archbishop being surmised to be dead, and the other defendant, by trial of the issue against him, being out of court, either to count, plead, or confess it, the Court shall adjudge thereupon according to the surmise of the plaintiff, and shall proceed to judgment against the defendant only. Wherefore the judgment was affirmed.

#### CASE 7.

#### Anonymous.

An indictment that A. and 27 others engrossed without saying *quilibet eorum*, is good.

2. Lev. 208.

INDICTMENT against 7. S. and twenty-seven others, of *Chefswick*, for that they engrossed *magnam quantitatem straminis et feni apud Chefswick*, with an intent to sell it and make it the dearer.

It was moved by *Robert Hide*, that this indictment was not sufficient, Because he doth not say that *quilibet eorum* ingrossed; for

2. Burr. 831. 3. Com. Dig. 642. 2. Hawk. P. C. 336. 342.

twenty-

twenty-eight may not ingross together.—*Sed non allocatur*: for it may be that twenty-eight may ingross and sell together; though it be not probable.

The SECOND EXCEPTION was, Because it is said, that they engrossed 13th January, 9. Car. 1. and 20. May, 10. Car. 1. at Cheshwick, "*magnam quantitatem straminis et fœni*;" which is altogether uncertain, not mentioning how many loads of hay and how many of straw they engrossed.—And for that cause the indictment was quashed.

1. Co. 12. 1. Roll. Rep. 137. Show. 389. Stra. 497. 849 900. 1246. 1. Salk. 342. 371. 687. 3. Com. Dig. 505. 2. Hawk. c. 25. s. 74. Cowp 682.

## Stile against Finch.

CASE 8.

**ACTION FOR WORDS**; and declares, they were spoken 2. Car. 1. The defendant pleaded not guilty; and it was found against him.

ADAM moved in arrest of judgment, that the action is brought for words spoken *six years* before the action commenced; so that by the statute of limitations he was barred of this action; and therefore the Court ought not to give judgment upon this verdict for the plaintiff.

JONES and BERKLEY held, that the plaintiff ought to have judgment, because the defendant hath not *pleaded* the statute: for there may be divers causes that he could not bring the action before this time, viz. that he was in prison, or within age, or beyond seas, or that he had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversing of the outlawry (as in truth the case was); for then the action is well brought,

But ADAM moved, that he should have then shewn it in his declaration.—But it was adjudged for the plaintiff.

## Stonehouse against Corbett.

CASE 9.

**ERROR** of a judgment in waste in the common pleas. The error assigned was, That divers wastes being alledged, to some of them the defendant pleaded "*nul wast fait*;" to others, he pleaded "*justifiable waste*;" to a third, he pleaded a plea in excuse of the waste. Upon these pleas issues were joined, and a *venire facias* awarded, reciting the issues, and commanding a jury to be returned to enquire if the defendant did commit the waste, as the plaintiff hath declared.

And for this cause ROLLE assigned it for error, Because they ought to have enquired of the several issues as they be joined.

But because that divers *venire facias* were in this manner; and the enquiry, "if waste be made as the plaintiff hath declared," implies, that they shall enquire according to the several issues; "if the waste were in such manner as the plaintiff hath declared," otherwise the verdict should be against him, THE COURT held it to be good enough, and no error. Wherefore rule was given to affirm the judgment.

Houell



## CASE 10.

## Houell against Barnes.

A devise to his wife for life, and after her decease the lands to be sold by his executors, is a naked authority, not coupled with an interest, and survives on the death of one of them, but he cannot sell till the death of the tenant for life.

1. Jones, 352.

Kelw. 44

2. Brownl 194.

2. Leon. 220.

2. Bulst. 125.

Godb. 46.

Perkins, f. 550.

Hard. 419.

Jones, 352.

1. And. 145.

2. And. 59.

Moor, 62.

Savil, 73. Cro. Eliz. 80. 26. 2. Peere Will. 308. Pow. on Dev. 292. 306. Note (1) to Harg. Ca. Lit. 113. a. 1. Com. Dig. 759. Cowper, 464.

UPON a suit in chancery, a case was agreed by the counsel of both parties and referred to JONES, BERKLEY, and MYSELF, Justices, to consider and certify our opinions.

The case was, One Francis Barnes, seised of land in fee, deviseth it to his wife for her life, and afterwards orders the same to be sold by his executors hereunder named, and the monies thereof coming to be divided amongst his nephews; and of the said will made William Clerk and Robert Cheffy his executors. William Clerk dies; the wife is yet alive.

Two questions were made:

FIRST, Whether the said William Clerk and Robert Cheffy had an interest by this devise, or but an authority?

SECONDLY, Whether the surviving executor hath any authority to sell?

WE ALL RESOLVED, that they have not any interest by this devise, but only an authority, and that the surviving executor, notwithstanding the death of his companion, may sell; and so we certified our opinions. But whether he might sell the reversion immediately, or ought to stay until the death of the wife, was a doubt. Vide 30. Hen. 8. Br. "Devise," 31. 9. Edw. 3. pl. 16. Co. Lit. 112, 113. 136. 181. 8. Aff. 26.

## CASE 11.

## Peard against Jones.

It is actionable to say of a barrister that "he is a dunce," and will get little by the law."

Post. 515.

2. Roll. Ab. 54.

55.

Godb. 441.

Co. Ent. 22.

2. Vent. 22.

Cro. Jac. 267.

1. Com. Dig.

182.

1. Mod. 172.

1. Lev. 297.

1. Vent. 98.

Ray. 196.

1. Sid. 327.

3. Will. 59.

Stra. 1138.

4. Bac. Ab. 492.

503.

ACTION FOR WORDS. Whereas the plaintiff was of the Middle-Temple for divers years, and called to THE BAR, and gave counsel to divers the king's subjects, and practised the law, and had married the daughter of J. S.; that the defendant, having communication with the said J. S. concerning the plaintiff, and the marriage of his daughter, said of the plaintiff, "He is a DUNCE, and will get little by the law." To which words the said J. S. answering, that "Others have a better opinion of him," he replied, "He was never but accounted A DUNCE in the Middle-Temple."

The defendant pleaded not guilty; and it was found against him, and damages to one hundred marks.

BING, Serjeant, moved in arrest of judgment, that these words are not actionable: for an action lies not for calling one "a dunce;" for DUNCE was a great learned man, and he was thereby compared to him, and then no discredit: and "dunce" is commonly spoken of one who is dull and heavy of wit, and though not so ready and nimble as others, yet he may be of a solid judgment; therefore they seem not words of discredit: and to say, "he will not get much by the law," that may be, because he will not give himself to practice.

But ALL THE COURT *seriatim* delivered their opinions, that the action well lies, for the words are to be intended according to the common speech; and *dunce*, in common intendment and speech, is taken for one of dull capacity and apprehension, and not fit for a lawyer. Words shall be taken in such sense as they are spoken; and

and they are alledged to be spoken maliciously, and to the intent to slander him in his profession; and so, upon not guilty pleaded, it is found, that he spake them maliciously. And for the words, that "he will not get much by the law," it is not to be intended that he hath no will to practise, and to gain by his profession; but he will not gain, viz. he will not deserve to gain, &c. Wherefore it was adjudged for the plaintiff.

Pleas  
against  
Jones.

Morgan's Case.

CASE 12.

**M**ORGAN and two others were indicted for counterfeiting twenty-shilling pieces of the king's coin, and Morgan for offering those pieces to the king's subjects, knowing them to be counterfeit. And being thereupon arraigned, he pleaded not guilty; and evidence being pregnant against Morgan, he was found guilty, and the others were acquitted: and judgment given, that he should be drawn and hanged; but not to be quartered, according to the opinion of STAUNFORD.

Judgment for uttering counterfeit shillings to be drawn and hanged, ut not quartered.  
Staunf. P. C. 182. a.  
3. Inst. 15. 17.  
Sum. 19. 268.  
P. C. 630.

2. Lev. 98. 1. Hale, 187. 219. 352. 2. Hawk.

Beale against Beale.

CASE 13.

**D**EBT upon an obligation conditioned for the performance of the arbitrament of J. S. so as the same be delivered upon the 28th of February following at the shop of John Rolf, scrivener, in Cornhill, &c. The defendant pleaded "nul tiel arbitrement." The plaintiff shews an arbitrament 27th February, and what; and that he delivered it at the shop of John Rolf, scrivener, in Cornhill; and shews the breach. And upon this the defendant demurred.

On a submission so as the award be delivered on the 28th at the shop of A. a delivery on the 27th is good.  
Hob. 49.  
4. Leon. 49.  
2. Saund. 292.  
2. Lev. 3.  
3. Lev. 413.  
Salk. 75.  
Kyd, 116.

One cause assigned by GRIMSTON was, For that the arbitrament is said to be delivered the 27th of February, and not the 28th of February; nor is it averred to be delivered at the *aforsaid* shop, nor to the *aforsaid* John Rolf: and it may be he hath removed his shop, and then it is not intended it should be delivered at the new shop; or there may be another John Rolf.—*Sed non allocatur*; for it shall not be intended another person nor another shop, unless the contrary had been shewn.

SECONDLY, Because the arbitrament was uncertain, viz. to pay the charges in such a suit.—*Sed non allocatur*; for they are certain enough, when the attorney hath made a bill of charges. Wherefore it was adjudged for the plaintiff.

An award to pay the charges of an attorney's bill is good.  
2. Ven. 242.  
Kyd, 135.

1. Roll. Ab. 251. 1. Lev. 13. 1. Sid. 12. 358. Carth 156. *Sed vide* 3. Lev. 414.

Langden against Stokes.

CASE 14.

**A**SSUMPSIT. Whereas the defendant on the 2d April, 9. Car. 1. (for such a valuable consideration) assumed to go such a voyage in such a ship before the August following, and alledges a breach in the non-performance:

A promise may be discharged by him to whom it was made before it is broken; and if made by words, may be verbally discharged.

The defendant pleaded, that before any breach the plaintiff, on the fourth of April at such a place, *exoneravit eum* of the said promise. Hereupon the plaintiff demurred.

1. Sid. 293. 177.  
1. Mod. 206.  
42. Yelv. 22.

ROLLE, for the plaintiff, now alledged, that this pleading a discharge without shewing how, was not good; and he cited divers

2. Leon. 214. 3. Lev. 257. Cro. Jac. 483. 620. 2. Mod. 44. Ray. 1 Jones, 179.

LANGDEN  
against  
STOKES.

books, 22. *Edw. 4. pl. 40.* that *indemnem conservet*, or *exonerabit*, is no plea.

MAYNARD, for the defendant, argued to the contrary, that forasmuch as this was an action grounded on a promise by words, it may be discharged by words, before the breach thereof; and therefore *exoneravit* generally is a good plea: and he cited for this THE YEAR-BOOK 3. *Hen. 6. pl. 36.*

1. Bac. Ab. 179.  
2. Term Rep. 26.

ALL THE COURT was of this opinion (*absente* BERKLEY.)—RICHARDSON, Chief Justice, said, that he knew it had been so resolved divers times; and the rule was remembered, "*Eodem modo quo oritur, eodem modo dissolvitur.*" Wherefore it was adjudged for the defendant, *quod querens nihil capiat per billam.*

## CASE 15.

## King against Coke.

Easter Term, 10. Car. 1. Roll

To a plea of *liberum tenementum* a replication shewing a lease for years, the date of which is antecedent to the defendant's title, need not traverse that the place where is the freehold of the defendant.

S. C. Jones, 352.  
Dyer, 171.  
Cro. Jac. 594.

TRESPASS. *Quare clausum fregit pedibus ambulando et averiis depasc.* &c. The defendant justifies, Because the place WHERE, at the time WHEN, *fuit solum et liberum tenementum* of John Marquis of Winchester, and so justifies by his command. The plaintiff replies, that this land is parcel of the manor of Abbots-Anns; and that William Marquis of Winchester was seised in fee of the said manor, and levied a fine thereof to the use of himself and Lucy his wife for their lives, the remainder to Lord Edward Pawlet for an hundred years, if he lived so long. William Lord Marquis died, and Lucy his wife died; and that Edward Lord Pawlet entered, and let to him for one-and-twenty years; who entered and put in his cattle, and avers the life of the said Edward Lord Pawlet. *Et hoc, &c.*

Hereupon it was demurred, Because this replication doth not answer nor confess and avoid THE FREEHOLD of the said John Marquis of Winchester alledged in the bar.

But ALL THE COURT held, that the bar being a bar at large, the title in the replication being at large, his claiming but a lease for years is a sufficient and good replication, without answering to THE FREEHOLD. Wherefore it was adjudged for the plaintiff.

## CASE 16.

## Vivian against Shipping.

Trinity Term, 10. Car. 1. Roll 1194.

In *assumpsit* for non-performance of an award, that the plaintiff should pay ten pounds to the defendant, and that the defendant should give a bond to the plaintiff to secure the enjoyment of land, or pay him forty pounds, an allegation that the plaintiff bath performed the award on his part, is sufficient, without alledging payment of the ten pounds.

ASSUMPSIT. That in consideration the plaintiff assumed to stand to the award of J. S. and J. D. for certain matters and controversies betwixt them, and if he failed, to pay the defendant forty pounds; the defendant assumed in the same manner to pay forty pounds to the plaintiff if he did not perform. The plaintiff shews, that the said J. S. and J. D. made an arbitrament, that the plaintiff should pay to the defendant ten pounds upon the 18th August following; and in consideration thereof, that the defendant should be obliged to the plaintiff in an obligation of fourscore pounds, that the plaintiff should enjoy such copyhold lands during the life of the defendant, or that he would upon request pay him forty pounds: and alledgeth *in facto*, that *licet* the plaintiff performed the award on his part, is sufficient, without alledging payment of the ten pounds. Post. 386.

part,



part, and that he, such a day and place, required the defendant to enter into such a bond, according to the said promise, the defendant had not sealed the said bond, nor had paid him the forty pounds, according to his promise. The defendant pleaded, "*nullum tale fecerunt arbitrium*;" and found against him.

ROLLE now moved in arrest of judgment, that this declaration is not good: FIRST, Because he doth not alledge the payment of the ten pounds; and the award is conditional in consideration thereof: so if he hath not paid the ten pounds, the other is not bound to make the obligation. SECONDLY, Because he doth not alledge a special request for the payment of the said forty pounds; and the *assumpsit* is to pay upon request, and without request it is not payable; so not being specially alledged, the action lies not.

To the first JONES and BERKLEY held, that it is a conditional award; and that there is a precedent condition, which if not performed, the other is not bound to make the obligation.

But I held the contrary, that it is not a conditional award, for it only appoints, that he shall enter into such a bond; and every one hath remedy upon the promise, the one against the other, if they do not perform the award.

But WE ALL AGREED, that although it be a condition precedent, yet when the plaintiff saith he hath performed the award on his side, it is intended that he hath performed it: and it is good in substance, though not in form; wherefore the defendant might, if he would, have demurred: and when he hath not demurred, but pleaded to the issue, denying the award which is found against him, he shall not now have advantage of this matter of form.

Lutw. 253. 632. Hob. 32. Cro. Jac. 115. 370. 682. 682.

To THE SECOND they all agreed, when it is an *assumpsit* to pay money, although it is upon request, the general allegation, *licet sapius requisitus*, is a sufficient allegation; and the bringing of the action is a sufficient request for money. Whereupon it was adjudged for the plaintiff.

Cro. Jac. 102. 183. 640. Cro. Eliz. 73. Yelv. 66. Hutton, 2. 4. Leon. 2. Winch. 2.

### Palmer against Knights.

CASE 17.

Trinity Term, 10. Car. 1. Roll 225.

**A**SSUMPSIT. Whereas there was a contract betwixt the defendant and one Cubit concerning certain trees growing upon such land; the defendant, in consideration the plaintiff would cut down or carry the said trees to the defendant's house, assumed and promised to him, that he would save him harmless of all damages and losses which might happen to him by reason of such cutting down or carrying away, when he should be thereunto required: and he alledges in fact, that he cut down five of the said trees and carried them to the defendant's house, and that the defendant had not saved him harmless, *licet sapius requisitus*, but suffered him to be sued at the common law for cutting down and carrying them away; whereby out divers sums of money, &c. is bad, and not aided by the verdict; for he ought to have alledged a special request, shewn where, for what, and how much he was damaged. Ante, 385. 3. Bish. 297. Cro. Jac. 652.

he

VIVIAN  
against  
SHIPPING.

I. Roll. Ab. 416.  
Cro. Eliz. 249.  
Lutw. 250 252.  
Salk. 171.  
Hardres, 9.

In *assumpsit* on an award, the defect of not shewing performance is aided by a plea in bar.

Ante, 209. 288.  
Post. 386.

On an *assumpsit* to pay money upon request, the general allegation is sufficient. Ante, 35.

In *assumpsit* on a promise to save the plaintiff harmless of all damages and losses, &c. a declaration that the defendant had not saved him harmless, but suffered him to be sued, whereby he was enforced to pay

PALMER  
against  
KNIGHTS.

he was enforced to lay out divers sums of money in defence of those suits. The defendant pleaded *non assumpsit*; and found against him, and damages to thirty pounds.

And it was now moved in arrest of judgment by GRIMSTON, that the declaration is not good, because he doth not shew in what court he was sued, nor what charges he expended, nor how he was damnified, being all in his own knowledge; wherefore he ought to have shewn the special breach, otherwise there is not any cause of action.

SIR WILLIAM DENNY moved, that the allegation "that he was put to divers costs and charges in defence of the suit," is sufficient: and although peradventure this had been cause of demurrer, yet having pleaded *non assumpsit*, and a verdict found and damages assessed, it appears he was damnified; wherefore it is now made good, and he shall not have advantage thereof.

RICHARDSON was of this opinion at the first, that the verdict aids it, otherwise clearly it is not good. But JONES, Justice, and MYSELF held, that the declaration was ill in substance, no breach being sufficiently shewn; and being ill in substance, the verdict cannot help it. And to that purpose JONES remembered a case of *Peck v. Methold*, where an *assumpsit* was, that he should deliver such an obligation upon request, after payment of such a sum: he alledges in fact, that the money was paid, and that, *licet sepius requisitus*, he had not delivered the obligation: the defendant pleaded *non assumpsit*; and found against him, and judgment in the common pleas for the plaintiff: and error brought, Because it was not to be delivered but upon request, so there ought to be a special request; which because it was not made, and the year and place alledged of the request, although the issue was taken upon the *assumpsit* and found, yet it was not good, but the judgment was reversed: which RICHARDSON remembered; wherefore he agreed, that the declaration was not good, nor aided by the verdict. Whereupon judgment was given for the defendant.

## CASE 18.

## Hopehill against Searle.

Hilary Term, 9. Car. 1. Roll 269.

A lease for "oc-  
"toginta et ter-  
"decem annos"  
shall be taken  
for a term of  
ninety-three  
years, and not  
for eighty and  
thirty.  
Ante, 33.

2. Roll. Ab. 247.  
252.

10. Co. 133. a.  
Carrh. 204.  
Powel on Con-  
tracts, 374.

**EJECTMENT.** Upon a special verdict the case was, That an abbot, in the twenty-first year of Henry the eighth, made a lease for *octoginta et terdecem annos*. The question was only, Whether in this case *terdecem annos* shall be said to be thirty or thirteen years?

PRESCOT, for the defendant, argued, that it should be expounded for thirty years, because it shall be taken most strong against the lessor, when there is no proper word for thirteen.

But ALL THE COURT held, that it shall be taken according to the common parlance for thirteen years; *terdecem* and *tresdecem* are all one, and it is so writ *euphoniae gratia*; and it being one entire word, cannot be otherwise taken; but if it were written as several words, it should be otherwise: wherefore, without further argument, it was adjudged for the plaintiff. And as BALL, for the plaintiff, urged, it being after *octoginta annos*, it shall the rather be so intended; for if  
he

he had meant it for thirty, it should have been one hundred and ten years; but being so writ, they agreed, it was for ninety-three years, and no more. Wherefore it was adjudged accordingly for the plaintiff.

HOPKILL  
against  
SHARLE.

## Baker against Hacking.

CASE 19.

Hilary Term, 8. Car. 1. Roll 347.

UPON a special verdict the case was, *John Coster* tenant in tail, the reversion over to *Robert Coster* in fee, they join in a lease for life by deed; and afterwards he in the reversion, during the lease for life, devises that reversion, and dies: afterward tenant in tail dies without issue. The question was, Whether this devise be good or not?

And it was argued at the bar by *ROLLE*, for the plaintiff, and by *MAYNARD*, for the defendant. The doubt was, If tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so as it is a greater estate than tenant in tail can make, whether it be a discontinuance of the tail only, or a discontinuance of the reversion also? for if it be a discontinuance of the reversion, then the deviser had not any power to devise.

But *JONES* and *I* held, upon the first motion, that it is not any discontinuance of the reversion, because he joins with the tenant in tail; and it is *quasi* a confirmation of the lease during the life of the tenant in tail, and during the time that he hath issue; but after his death without issue, it is the lease of him in the reversion: and during the life of the lessee, it is a discontinuance *quoad* the tenant in tail and his issue; but it is not so as to the reversion, for that remains as it was.—*RICHARDSON*, Chief Justice, inclined to this opinion; but *BERKLEY* doubted: whereupon it was adjourned till the next Term (a).

A lease for life made by a tenant in tail and the reversioner in fee is a discontinuance not only of the estate in tail but of the reversion also; notwithstanding the tenant in tail die without issue during the life of *cestui que vie*.

See post. 405.

S. C. Jones, 358.  
13. Hen. 7. 22-6.  
1. Roll. Ab. 633.  
Hutton, 26.  
Co. Lit. 326.  
335. a.  
Cro. Eliz. 827.  
3. Com. Dig. 70.  
Powel on Dev. 35.

(a) See post. 405.

## Hinley against Wilkinson.

CASE 20.

Hilary Term, 8. Car. 1. Roll 302.

ERROR of a judgment in the common pleas in an ACTION UPON THE CASE. Whereas the plaintiff had declared, That he was a copyholder of the manor of *Lull*, whereof a great waste, called *Lull Waste*, was parcel, and the copyholders of the manor having common there, that the defendant being seised of parcel of a wood called *Lull-wood*, adjoining to the said common, maintained conies in the said wood, which run out thereof into the common and eat up the common; whereupon the action was brought. The defendant traverseth the prescription to the common; and it was found against him, and judgment given.

*GERMYN*, for the plaintiff in the writ of error, moved, that this declaration was not maintainable, Because none can say, when conies are upon the common, whose conies they are: and they cannot be said to be the defendant's conies more than any others, for being

A commoner cannot maintain an action for damage done by the rabbits of another upon the common; for they are then *fera natura* and he may kill them.

Post. 554.

Jones, 356.  
1. Roll. Ab. 90.  
405.  
2. Bulst. 116.  
7 Co. 17.

Moor, 421. Co. Lit. 56. Cro. Jac. 195. 492. 2. Leon. 201. Bridg. 10. 1. Barrow, 259.  
268. 2. Willf. 51. 2. Com Dig 433. Powel on Devises, 5.

out



HINSLEY  
against  
WILKINSON.

out of his soil he hath no interest in them more than any other, they being *feræ naturæ*, so as he hath not any property in them until he takes them; and therefore *Fitzh. Nat. Brev.* 87. & 89. saith, they shall not be said *cuniculos suos* nor *pisces suas* in common rivers: and although the commoner hath loss, yet it is without injury by the defendant.

GRIMSTON, likewise *for the plaintiff*, urged further, that if this action should be maintainable there would be a multiplicity of suits, for every commoner would have an action; which ought not to be suffered: and here is no more cause of action than when one suffers his doves to fly into the corn adjoining, for which clearly no action lies; for it cannot be known whose doves they are, and the commoner is not at any mischief, for he may kill them if he can; and for that point cited 5. Co. 104. b. *Boraston's Case*.

And so held ALL THE JUSTICES here, except BERKLEY, who doubted thereof: wherefore rule was given, that the said judgment should be reversed, if upon such a day, the next Term, other cause was not shewn, &c.; which was done to the intent there might be conference with the Justices of the common pleas, to know if it had been moved in the common pleas, or if it had passed *sub silentio*, being after verdict. And the same day I conferred with HUTTON, VERNON, and CRAWLEY, Judges of the common pleas, if they knew any such case had been moved in their court; and they all said, they did not remember any such to be there moved, but that it passed *sub silentio*. And they all held, that an action upon the case lies not for a commoner; but he may kill them, for none hath any property in them. Wherefore the judgment was reversed.

## CASE 21.

## Bull against Wyatt.

Livery on lease for life à die datus is void; and thoughtive lessee enter and pay the rent it will not purge the disseisin, and make him tenant at will.

Ante, 94. 304.

Co. Lit. 217. a.

1. Roll. Rep. 109

1. Roll. Ab. 661.

823 865. 868.

Cro. Jac. 53.

1. Roll Rep. 229.

(a) 3. Lev. 483.

Lord Ray. 84.

1242.

Salk. 413.

Powel on Pow.

487. 501.

Gowper, 718.

3. Com. Dig.

276.

EJECTMENT for a garden in *Bristol*. Upon a special verdict the case was, One *Reignald* and his wife, being seised in fee in right of his wife, by indenture and with letter of attorney to make livery, lets that garden, *HABENDUM à die datus (a)*, for life of the lessee, rendering 6s. 8d. *per annum*; and the attorney made livery the same day, *secundum formam chartæ*. The lessee enters and paid the rent; which was always received. The wife dies: her heir, without entry, suffers a common recovery, to the use of the plaintiff. The question was, Whether this were a good recovery?

ROLLE, *for the plaintiff*, argued, that the lease was void, and that livery the same day it bears date is void, to make it a good lease.— And so held ALL THE COURT, and would not admit it to be livery.

SECONDLY, Admitting it to be a void livery, yet he held, that entering and paying his rent he is but tenant at will; as one entering without livery is tenant at will to the feoffor: and he cannot be a disseisor without an intent in him to make a disseisin; and without the intent of the lessor to have it to be a disseisin; and he is accounted in law but as a tenant at will; and for proof thereof he relied upon 28. *Aff.* 11. and 1. *Edw.* 3. *Aff.* 7. and the case in *Easter Term*, of *Blunden v. Baugh*, 4. Co. 73. 11. *Hen.* 4. pl. 29, 30. 9. *Hen.* 6. pl. 6, 7.

THIRDLY,

THIRDLY, admitting it was a *disseisin*, yet suffering a recovery, he and all under him are *estopped* to say he was not tenant of the freehold; wherefore the recovery is good.—THE COURT inclined to that opinion: but because there was none of the defendant's part in court, no judgment was then given; but ruled, that if cause were not shewn, &c. judgment should be entered for the plaintiff.

2. Roll. Abr. 865. Raym. 323. See Com. Dig. "Chancery," (4. f. 4.) Co. Lit. 352. 1. Burr. 79. Douglas, 53. note (17).

## Prouse's Case.

CASE 22.

PROUSE, an attorney of the king's bench, was elected tithingman of *Taunton*; in which town a custom is pretended to be, that every one shall be a constable or a tithingman according to their several houses; and he having purchased two houses in the same town, was, in a leet there held, elected tithingman: and thereupon he brought a writ of privilege to be discharged, because he is to be attendant in this court. But the justices of peace would not allow thereof, but desired the Justices of assize to direct whether it should be allowed; who would not meddle therewith, but ordered it should be moved in this court.

MAYNARD thereupon now moved, that this writ is not to be allowed: for although in truth attorneys and clerks of the court have such a privilege to be discharged when they are generally elected, because their attendance being required here, they shall not be compelled to attend such an office; yet when there is a special custom, that they shall be elected in course according to the situation of their houses, that custom ought to prevail against such privilege; for otherwise one attorney may purchase many of the houses in the town, and then there shall not be sufficient persons to do the service; as in truth in this case, he hath purchased seven houses in the said vill: wherefore he ought to be charged.

BUT ALL THE COURT held, that it cannot be a good custom; for then a woman being an inhabitant in one of the said houses, it may come to her course to be constable, which the law will not permit; so this custom pretended cannot hold place against a person who is by his office to be attendant here. Whereupon it was ordered that he should be discharged.

An attorney cannot be obliged to serve the office of tithingman; and a custom that all householders shall serve the office of constable or tithingman by turns, according to the situation of their houses, is bad. Post. 585.

Noy, 112.  
March. 30.  
2. Keb. 309. 477.  
508. 578.  
2. Roll. Ab. 272.  
1. Lev. 265.  
1. Sid. 355.  
1. Bl. Rep. 636.  
2. Bl. Rep. 1123.  
Strange, 943.  
1143.  
Dougl. 538.  
2. Term Rep. 403.  
2. Hawk. P. C. 99.

## Stevenson's Case.

CASE 23.

STEVENSON being in execution for a debt to the king adjudged against him in the exchequer, was condemned in this court in debt by a judgment, and was brought to the bar by *habeas corpus* to be charged in execution for this debt also.

BING, *Serjeant*, now moved, that he ought not to be charged in execution here, because he is in execution at the king's suit; for he is appointed by the 21. *Edw. 3. c. 19.* "That a common person shall not have execution against the king's debtor, until he makes agreement for the king's debt, and then he shall have his debtor in execution, and detain him until he hath made satisfaction of the debt due to himself, as also of the debt which he paid for him to the king."—THE WHOLE COURT was of that

A person in execution for a debt due to the king may also be charged in execution at the suit of a common person, except he have a writ of protection.

1. Inst. 2.  
Godb. 290.  
Hard. 24.  
2. Roll. Ab. 159.  
Cro. Eliz. 164.

1. Inst. 2. Banb. 8. 42. 3. Mod. 236. Co. Lit. 131. Cro. Jac. 477. Hob. 115. Cro. Eliz. 164.  
2. Show. 65. Parker, 260. Jenkins' Centuries, 213. 4. Term Rep. 316.

CRO. CAR.

C c

opinion;

STEVENSON'S  
CASE.

2. Com. Dig.  
648.

3. Bl. Com. 289.

opinion : but forasmuch as he had not a writ of protection THE COURT resolved, that he is out of the statute; and thereupon awarded, that he should be in execution as well for the party as for the king.

See 33. Hen. 8. c. 39.

CASE 24.

Gryffith's Case.

A recognizance  
*garderet pacem*  
is good.

1. Roll. Abr.  
486, 487.

A *scire facias* on  
a recognizance  
of the peace,  
shewing a  
breach after the  
date of the re-  
cognizance, is  
good.

SCIRE FACIAS against Gryffith upon a recognizance for the peace taken 9th May, 9. Car. 1.

THE FIRST EXCEPTION taken by GRIMSTON was, Because the recognizance was *garderet pacem*, whereas it ought to have been *conservaret pacem*.—*Sed non allocatur* : for so are many of the precedents; and it is as well as *conservaret pacem*.

SECONDLY, The recognizance is, that he shall appear at the next general quarter sessions for the said county, and in the interim *gardere le peace*. And it was alledged, that after the recognizance taken, and before the next general quarter sessions, viz. 29th June, 9. Car. 1. he assaulted one SUCH, and beat him, and so brake the peace. The exception was, Because he did not shew the day of the next sessions.—And I was of opinion, that for this cause it was ill; for he ought to ascertain the Court when the next sessions was, and so that the breach of the peace was before the said quarter sessions.—But RICHARDSON, JONES, and BERKLEY held, the allegation, that the breach was after the date of the recognizance, and before the next sessions, sufficed. But they would advise until the next Term.

Hilary

EJE  
it  
Jo  
eration  
parent,  
plaintiff,  
ary shall  
an el



## Hilary Term,

10. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

Netter against Percivall Brett.

CASE 1.

Michaelmas Term, 10. Car. 1. Roll 132.

**P**ROHIBITION being granted to stay a suit for the probate of a Consultation testament concerning land and goods, wherein the land was awarded *nisi* to charged with a condition in part for payment of certain legacies, it prove a will of was prayed to have a consultation. *lands and goods, where the land*

JONES and BERKLEY, *Justices*, agreed, that they should have a was charged consultation, because the probate of testaments properly appertains to with payment of certain legacies. the spiritual court, and the probate or non-probate cannot be any Ante, 115. 165. prejudice to the heir, nor to him who claims the land by the devise; Post. 396. and an inconvenience would ensue, if there should not be a probate concerning the personal estate, that the executors might not have Jones, 355. any actions for debts, nor dispose of the goods. And therefore JONES 1. Roll Ab 31. said, he had seen the record of *The Marquis of Winchester's Case* (a), 535. where the will being for lands and goods, consultation was granted Salk 552. generally. 1. Mod. 90. Hard. 313. Cowp. 424.

But I doubted thereof, because the land is the principal, and they have no authority to meddle with any will concerning land; and there might be an inconvenience, if the will there should be countenanced or discountenanced concerning the land. And because there was a prohibition granted, I was of opinion, the parties ought to pursue the usual course, which is, that the defendant should appear, and the plaintiff declare; and then upon demurrer it might be adjudged, and not upon a motion.

But THE OTHER TWO JUSTICES (RICHARDSON, *Chief Justice*, being sick and absent) gave a rule, that if other matter were not shewn, &c. consultation should be awarded (b).

(a) 6 Co. 23.

after argument by the Judges *seriatim*, a

(b) This case was moved again; and, consultation was awarded Post. 396.

Gymlett against Sands.

CASE 2.

Trinity Term, 8. Car. 1. Roll 678.

**E**JECTMENT of a lease of *Hugh Boscarele*. By a special verdict If a verdict find it was found, that *Humphry Martin* was seised in fee, and had a freehold by *John Martin* by *Hebell* his wife, who by indenture, in consi- a father (who is tenant for life tation of love to his said wife, and to *John* their son and heir ap- with remainder to B. his son) and parent, and to settle the land upon him and his heirs, enfeoffed warranty to the plaintiff, and that B. is the only son by such a wife, without finding that he is heir to the freehold, the warranty shall not descend to bar B's remainder; so he shall not be intended heir, as his father might have an elder son by a former wife. *Sed quare.*

C c 2

A. B.

GYMLETT  
against  
SANDS.

1. Roll. Ab. 856.  
2. Roll. Ab. 421.  
701. 741.  
2. Leon. 120.  
3. Lev. 125. 225.

- Cowp. 826.  
1. Term Rep.  
141.  
4. Term Rep.  
75.

If husband and wife are seised for life, remainder to their son in tail with a fee expectant, and the husband make a feoffment with warranty, and die, and afterwards the wife and the son join in a fine, it is a forfeiture of her estate for life, although she did not know of the warranty.

- Ante, 22. 130.  
371.  
Co. Lit. 215. b.  
252. a.  
1. Roll. Ab. 856.  
1. Co. 76. b.  
2. Lev. 202.  
1. Leon. 40.  
Styles, 192.  
Douglass, 53.

A. B. and others to the use of himself for life, without impeachment of waste; and after to his wife for her life; and after to the use of the said John Martin and the heirs males of his body; remainder to his right heirs. Afterwards the said Humphry, in the 5. Jac. 1. infeofed John Smith by indenture, with warranty against all persons; and afterwards, in the 6. Car. 1. died. Hebell the wife enters.—John the son enters upon John Smith, and enfeofed Boscavele the lessor with warranty. John Smith enters; then Boscavele the lessor enters, and makes the lease in the declaration mentioned; the defendant, as servant to John Smith, enters and ousts him. They found that the said Hebell was yet alive. *Et si super totam materiam, &c.*

ROLLE hereupon argued for the plaintiff, FIRST, That the lessor of the plaintiff hath good title, for he claims by the wife and the son, which son hath good title to the remainder clearly; and the wife hath a good estate for her life; and they had a good title to enter and enfeof the lessor of the plaintiff, unless it were by reason of this warranty: and it is not found, that the son is HEIR to this warranty of the father's; for although it be found, that the said Humphry had issue by the said Hebell his wife the said John in remainder, *unicum filium suum*, yet it is not found that he is heir: and it may be that he had other elder sons by a former venter; and the Court will not intend a warranty by supposition.

SECONDLY, This feoffment by the wife joining with John, who hath the remainder, is no forfeiture, without finding that she had notice of the feoffment and warranty: for as in *Mallory's Case* bargainee by deed inrolled shall not enter upon the lessee for non-payment of the rent, unless it were shewn that he had notice; and so 8. Co. 92. a. *Francis' Case*.

MAYNARD to the contrary, for the defendant. FIRST, He shall be intended heir rather than otherwise in a special verdict, because it is found that he had him *unicum filium suum*; and it shall not be intended there were more sons without shewing.

SECONDLY, That it is a forfeiture; for she ought to have taken notice at her peril when none is bound to give notice, as here none is bound: and there is a difference betwixt a condition and this voluntary act of the feoffment, which is a forfeiture.

JONES and BERKLEY, Justices, afterwards delivered their opinions, that this warranty is no bar, because it was not found that he was heir; and the rather it shall be intended that he is not heir, because it is a collateral warranty, which is not to be favoured (a): and it may be that he had elder sons by another venter; for there might be an attainer.

But I held the contrary, that the verdict in this point is well enough, and found him heir; for it is found that the indenture calls *filium et heredem suum apparentem*; and a plurality of sons shall not be intended: and in a special verdict intendment sufficeth, especially as this case is; because if he be not heir, there is no colour to have a special verdict. 5. Co. 97. *Goodale's Case*, that the verdict shall be taken by intendment.

(a) See 4. Ann. c. 16. s. 21. Ante, page 369, in note.

FOR THE SECOND POINT they all resolved, that if the warranty had been well found, it were apparent that the estate of the son was bound, and her joining in a feoffment with the son is a forfeiture, as if she had joined with a stranger who had nothing to do therewith; and that she at her peril ought to take notice of the said feoffment, because the delivery is a public and notorious act, and the feoffment is a forfeiture at the common law; and it is not like a condition, which is taken strictly: and she ought at her peril to take notice of this act upon the land, none being bound to give her notice.—Wherefore as to this point they all agreed; but upon the first point they would advise.

GYMLETT  
against  
SANDS.

## Memorandum.

CASE 3.

UPON the 4th of February, 10. Car. 1. A. D. 1634, about the hour of eleven in the forenoon, SIR THOMAS RICHARDSON, Knight, Chief Justice of the King's Bench, died at his house in Chan-*cery-lane*: and all the writs which were sealed that day bare *teste* THOMAS RICHARDSON; and all those which were sealed the next day bare *teste* WILLIAM JONES, he being second Justice of the King's Bench (a).

RICHARDSON,  
C. J. dies, and  
is succeeded by  
JONES.

(a) 2. Hawk. P. C. ch. 27. f. 8.

## Meade against Thurman.

CASE 4.

PROHIBITION was prayed upon suggestion of this custom, That for tares cut or mown before they are ripe, and given to plough-cattle, tithes ought not to be paid: and upon another custom, for headlands sown with corn used to be fed with plough-cattle, or mowed and cut for that purpose, that the owners shall be discharged of tithes.—And upon this suggestion, grounded upon special customs, THE COURT granted a prohibition.

By custom, tares  
and green corn  
on headlands,  
for the purpose  
of feeding cattle  
of the plough,  
may be exempt  
from tithes,  
Post. 403.

§ C. Jones, 357. 1. Roll. Abr. 646. 2. Leon. 27. Bunb. 279. 2. Mod. 498.  
3. Com. Dig. 94. Dougl. 204.

Lord Ray. 243.

## Dymmock against Fawcett.

CASE 5.

Michaelmas Term, 10. Car. 1. Roll 148.

ACTION FOR WORDS. For that he said of the plaintiff and to the plaintiff, being of good fame, and one who had served as captain in the wars, *hec verba* in London, "Thou art a pimp;" averring, that in London that word was known to be intended "a bawd": and further said, that he was "a common pimp, and notorious; which he would justify." A verdict was found for the plaintiff.

"Thou art a  
"common and  
"notorious  
"pimp," are  
words very slan-  
derous, but not  
actionable, un-  
less accompa-  
nied by some  
special damage.  
Ante, 229. 329.

LITTLETON, the King's Solicitor, moved in arrest of judgment, that these words are not actionable; for it is a mere spiritual slander, as "whore," or "heretick," and punishable in the spiritual court, and not at the common law. And he said, that divers times suits have been in the spiritual court for such words, and prohibitions prayed and never granted; *vide* YEAR-BOOK 27. Hen. 8. pl. 14.; but to say that "he keeps a bawdy-house," is presentable in the leet, and punishable at the common law.

350.  
Post. 457.  
Styles, 326.  
1. Roll. Ab. 37.  
1. Roll. 44.  
1. Mod. 41.  
Moor, 10.  
Hob. 126.  
1. Com. Dig.  
193.

WARD *è contra*; Because it is spoken of one of an honourable profession, *viz.* a soldier, and trenches to his disreputation to be

taxed Dougl. 380.  
note (14).



DYMMOCK  
against  
FAWCETT.

taxed with such a base offence. And he said, that such offences have been divers times punished in *London* by corporal punishment.

But it was answered, that was by custom; and there the calling one whole is actionable.

JONES, *Justice*, held, that the action lay not.

We all agreed, that the exposition and averment, that "*pimp*" is known to be a name for "*a common pandar*," is good.

BERKLEY and I agreed, that the words are very slanderous, and more than if he had called him "*adulterer*," or "*whoremonger*;" for this is an infamous offence, to be a solicitor for others for such base offices: and it tends to the breach of the peace to use such a course of life; and he may be indicted and punished for it corporally.

Wherefore, by the assent of JONES, rule was given, that judgment should be entered. But afterward, in *Michaelmas Term*, 11. Car. 1. it was moved again; and JONES holding his first opinion, BRAMPSTON agreeing with him, the judgment was stayed.

CASE 6.

Nichols against Walker and Carter.

*Trinity Term*, 10. Car. 1. Roll 222.

A parish by reputation at and before the making the 3. Eliz. c. 2. shall maintain its own poor, and not be rateable to an adjacent parish, in which it was originally a vill.

Hard.

2. Salk. 501.  
And see Mr. Confl's edition of Bott's Poor Laws, page, 64. to page 74.  
4. Term Rep. 266.

TRESPASS for entering into his house in *Tottridge*, and taking a fowling-piece and other goods. Upon not guilty, a special verdict was found.

Carter was churchwarden of the parish of *Hatfeild*, and Walker was overseer of the poor of the parish of *Hatfeild*; and on the 16th of *November* 1632, a rate was made by the inhabitants of *Hatfeild* for relief of the poor of that parish, according to the statute. The plaintiff was an inhabitant in *Tottridge*, not having any lands in *Hatfeild*, but having lands in *Tottridge*, and was rated by the said rate at twelve pence the month towards the relief of the poor of *Hatfeild*. The rate, upon the 20th *April* 1632, was allowed by two justices of the peace of the said county, whereof one was of the plaintiff, and he refused to pay; wherefore, by warrant of three justices of the peace to levy that sum upon his goods and chattels, they, by virtue thereof, distrained those goods, and sold them for twenty shillings, and offered the residue to the plaintiff.—And they found, that anciently the village of *Tottridge* was parcel of the parish of *Hatfeild*: that there was not any legal act to sever the said vill from the parish of *Hatfeild*: that *modo et ante tempus cujus*, &c. the tithes of *Tottridge* were paid to the parson of *Hatfeild*: that the parson of *Hatfeild* used always to find a curate at *Tottridge*: that there is no parson at *Tottridge*: that for threescore years past and more, and at the time of making of the statute of 43. Eliz. c. 2. for relief of the poor, *et semper exinde usque hunc diem, dicta villa de TOTTRIDGE communiter reputata fuit esse parochia de se, et per totum idem tempus constabularios, gardianos ecclesiæ, et supravijores pauperum dictæ villæ de TOTTRIDGE habere consueverunt per electionem inhabitantium ibidem*: that for all the said time rates, assessments, and levies, have been made there by them for the relief of the poor of *Tottridge*; which rates, during all the said time, have been used to be levied by their proper officers for relief of the poor there, without any paying to the poor of *Hatfeild*, or joining in

in any assessment with the town of *Hatfield*: that the church of *Tottridge* during all that time, have had all parochial rights; and that the inhabitants of *Tottridge* have not used all that time to contribute to the reparation of the church of *Hatfield*, but to the reparation of their own proper church and chapel only. *Et si super totam materiam, &c.*

After argument at the bar by BRIAN, for the plaintiff, and by ATKINS, for the defendant,

THE COURT resolved, that judgment ought to be given for the plaintiff: for *Tottridge* being a parish in reputation so long before and after the statute, and at the time of the statute made, it shall not be now for this purpose charged by *Hatfield*; but it shall be charged by itself, and for their poor only: and they relied upon the judgment given in the case of *Hilton v. Pawle* (a).

ATKINS then moved, although it should be allowed that the inhabitants of *Tottridge* be not chargeable with these rates, yet upon this verdict the defendants are not guilty, because they did it by warrant from the justices of peace; so they did it as officers, and therefore excusable. — *Sed non allocatur*: for the rate being unduly taxed, the warrant of the justices of peace for the levying thereof will not excuse: and it is not like where an officer makes an arrest by warrant out of the king's court; which if it be error the officer must not contradict, because the Court hath general jurisdiction: but here the justices of the peace have but a particular jurisdiction, and to make warrant to relieve rates well assessed. Wherefore it was adjudged for the plaintiff.

Carth. 346. F. N. B. 81. 10. Co. 76. 2. Bl. Rep. 1142. Salk. 600. 1. Wils. 153. 2. Wils. 205. 384. 3. Com. Dig. 491. 2. Hawk. P. C. 63. Mr. Const's edit. of Bott's Poor Laws, vol. i. p. 201.

(a) Ante, 92.

### Netter against Percivall Brett.

CASE 7.

Vide Ante, 391.

THIS Case was argued by the Justices *seriatim*. — JONES and BERKLEY agreed, that consultation should be granted to prove the will, because it is one entire will, although it be made as several wills: for that he first made his will concerning his goods, and makes the defendant his executor, and appoints therein divers legacies; and after in the same paper, leaving the space of a line void, he writes in this manner, "That if his personal estate shall not suffice to satisfy his legacies and debts, he appoints part of the profits of the land to his executors for a time:" and in the conclusion of the will, "IN WITNESS whereof, to this my will I have put my hand and seal;" and thereto subscribed his name and put his seal: so it appears to be all one entire will.

And therefore BERKLEY, Justice, said, that he would insist upon two rules: FIRST, That the probate of testaments for personal things appertains only and properly to the spiritual court; and for the probate of such testaments no prohibition lies (a). SECONDLY, That the probate of testaments concerning lands only, and no goods contained therein, ought not to be proved in the spiritual court by compulsion, although they may be proved there; and if there be a suit to compel any to prove such testaments

NICHOLLS  
against  
WALKER and  
CARTER.

Ante, 93.

A warrant to  
distrain for a  
poor's rate made  
by the justices  
of A. on an in-  
habitant of B.  
will not justify  
the officer who  
executes it, if the  
parish of B. be  
unduly taxed.  
Post. 602.

Hardres, 478.

1. Vent. 273.

2. Wils. 205. 384.

A will of per-  
sonal effects can  
only be proved  
in the spiritual  
court; a will  
concerning lands  
and goods, if it  
is one and en-  
tire, ought also  
to be proved  
there; a will of  
lands only may  
be proved there,  
but not as a  
matter of right;  
Ante, 115. 165.

391.

1. Com. Dig.

237.

3. Com. Dig. 1.

4. Com. Dig.

199. 511.

Powell on De-  
vises, 688.

(a) 9. Co. 37. Eq. Ca. 207.

in

NETTER  
against  
BRETT.

(a) R. 88.  
Co. Lit. 111. a  
2. Inst. 112.  
D.M. 117.  
29. Car. 2. c. 3.

6. Co. 23. b.

Cro Jac. 346.  
Ante, 115.

See the case of  
Hill v. Thorn-  
ton, ante, 166.

See Westley's  
Case, ante, page  
94.

in the spiritual court, a prohibition lies : and commonly such wills where the lands are devisable by custom, are proved before the ordinary; and therefore THE REGISTER, 246 mentions, that wills of land in *London* are first proved before the ordinary, and after before the mayor in the hustings (a) : and in boroughs a devise of lands by custom is a devise of chattels, and so termed and reputed. Then when a will is concerning lands and goods, and is one entire will (as the conclusion of this will makes it), and in the will of the land is a clause, that "the profits of the land shall be for the performance of the will," so as it is a mixed will, it is reason it should be proved entirely in the spiritual court, to enable the executors to sue for debts, and to expedite the payment of the legacies, which otherwise might be longer delayed : and the probate of the will for the land will not prejudice the heir, for it shall not be evidence at the common law; nor the witnesses being there examined, their examinations shall be given in evidence at the common law. And he cited the resolution and agreement of all the Judges before the king, that where a testament is made of *land and goods*, no prohibition lies to stop the probate of the said testament for the goods; and that in such case the testament being mixed of land and goods, probate shall be of the entire will, and ought not to be of parcels. And he likewise cited the case 9. *Eliz. Dyer*, 264. that land was devised to be sold for the payment of legacies, the land being sold, the suit for the money to be distributed may be in the spiritual court, contrary to the opinion of 4. & 5. *Phil. & Mary*, although it be rising out of the land.

And JONES, *Justice*, agreed with him in respect of the inconvenience which otherwise might ensue, if the probate of the testament for the goods should be deferred; and they both held, that a consultation shall be awarded. And although it is here granted upon motion without special pleading and demurrer, yet he said he it was good enough; for anciently in this court there were no declarations and suggestions upon prohibitions, but they were granted upon motions. And consultations were granted upon motions without demurrer, as in the common pleas.

But I argued to the contrary, FIRST, That the prohibition is well granted, and upon good grounds; and therefore a consultation ought not to be awarded. SECONDLY, If it should be awarded, yet it ought to be after plea and demurrer, so as the matter might appear in pleading for what cause it is granted. TO THE FIRST, that it is well granted, because the prohibition, as it is drawn and no mention of the goods; and thereby is endeavoured to make a probate of this testament, which concerns lands only, and so to draw into question *laicum feodum*; and always in such cases a prohibition was granted. And whereas in THE REGISTER it is said, that the probate of testaments in *London* is first before the ordinary, and then in the hustings, it was answered, that it is alledged to be by special custom; which proves, that without special custom it ought not to be proved there. And as to the resolution of the Justices, that a prohibition shall not be granted to stop the probate of a testament for goods, where it was made for lands and goods, that doth not prove that a prohibition may not be granted to stop the probate of a testament for lands. And, as my brother BERKLEY said,

testaments



testaments of land only shall not be proved in the spiritual court; and a prohibition shall be granted if they so do: so here, for any thing which appears to the contrary; and, as it is supposed in the prohibition, the Court as judges cannot take consueance that it is otherwise: and although the copy of the testament be shewn unto us, that it is in one entire paper, and one seal, and the other circumstances before mentioned, yet that is but private information, of which we are not to take cognizance as of matter of record. And I assented to the case in 9. *Eliz.* but upon this reason, Because the land being sold the money is personal, and assents in the hands of the executors, so as it favours not of the realty being executed. **SECONDLY**, I held, That if consultation should be granted, it ought not to be in this manner, contrary to the usual course, upon a motion, without pleading and demurrer; and as it is here upon an interlocutory speech at the bar only, the ground thereof not appearing of record: and inconvenience would ensue if such course should be suffered; for the party might be prejudiced, and peradventure erroneously, and yet he should not have his writ of error. And for this very cause divers precedents have been where prohibitions were granted; as in the case of *The Marquis of Winchester (a)*, *Lloyd v. Lloyd (b)*, *Westey's Case (c)*, and *Hill v. Thornton (d)*, where a prohibition was granted, and a trial had, whether it was a good will, and found good, yet a consultation was granted only for the goods.

But here in this case a consultation was granted generally.

(a) 6. Co. 23. (b) Mich. 38. *Eliz.* Roll. 355. (c) Ante, 94. (d) Ante, 166.

### Miller and Johns against Manwaring.

CASE 8.

**E**RROR of a judgment in *Chester*, in an ejectment of lands in *Blacon*, of the demise of *Sir Randolph Crew*, the 12th of *August*, 4. Car. 1. where, upon a special verdict, it was found, that *John Earl of Oxford* and *Elizabeth* his wife, in right of the said *Elizabeth*, were seised in fee of the manor of *Blacon*, whereof the land in question is parcel, and had issue *John*. Afterwards the said *John Earl of Oxford*, by indenture the 10th of *February*, 27. Hen. 8. let that manor to *Anne Seaton* for thirty-four years. That *Elizabeth* died 29. Hen. 8.; and on the 21st *March*, 31. Hen. 8. the said *John Earl of Oxford* died. Afterward, 30th *July*, 35. Hen. 8. the said *John* the son, then *Earl of Oxford*, by indenture, reciting the lease to *Anne Seaton* to be dated 10th *February*, 28. Hen. 8. let the said manor to *Robert Rochester*, "HABENDUM after the end, surrender, or forfeiture of the said lease to *Anne Seaton* for thirty years."—and they find, that after the making of the said indenture, the said words "28. Hen. 8. were rased and altered, and made 27. Hen. 8.;" and that afterward, viz. 26th *March*, 35. Hen. 8. the said *John Earl of Oxford*, by indenture betwixt him and *Hamlet Freere* (reciting the lease to *Anne Seaton*, 10th *February*, 27. Hen. 8.) granted the reversion of the said manor and premises to the said *Hamlet Freere*, "HABENDUM the said manor and premises from such time as the same shall revert and come to the possession of the said earl or his heirs, by surrender, forfeiture, or otherwise, for sixty years:" and afterward, in 4. *Eliz.* the said *John Earl of Oxford* died seised,

Tenant by the curtesy grants a lease to A.; his heir grants another lease to B. to commence after that to A. in which was a material error; and another lease of the reversion of the lands demised to C.; the next heir grants another lease of the premises to D. habendum from the end of the said leases, and mis-reciting the lease to B. the inheritance of the premises descended to E. who made a lease to the plaintiff.

Post. 502.

W. Jones, 354.

1. Roll. Abr. 849. 2. Roll. Abr. 29. 44.

and

MILLER and  
JOHNS  
against  
MANWARING.

I. Levinz, 234.

The question is,  
Which of these  
leases are good?

If a tenant by  
the curtesy make  
a lease for years  
reserving rent,  
the lease is so  
absolutely de-  
termined by his  
death that no  
acceptance of  
rent by the heir  
can make it  
good.

Plow. 30. 272.  
Jones, 354.  
Vaugh. 80.  
3. Bac. Ab. 397,  
398.  
1. Roll. 830.  
Cowp. 595.  
Douglass. 50.

A lease to com-  
mence after  
the determina-  
tion of a prior  
lease shall begin  
presently, if the  
2. Bac. Ab. 663.

and the said manor descended to his son *Edward Earl of Oxford*: that he by indenture betwixt him and *Geoffrey Morley*, dated 14th July, 15. Eliz. reciting, "Whereas *John* his father by indenture, 30th July, 35. Hen. 8. demised to *Robert Rochester* the said ferm or manor of *Blacon*, HABENDUM for thirty years, from the end or determination of the lease made to *Anne Seaton*, dated 10th February, 28. Hen. 8. for twenty-four years" (which is a false recital, for in *Rochester's* lease it is recited, that the lease to *Anne Seaton* was dated 10th February, 28. Hen. 8.), "and re-granted the lease to *Hamlet Freere* for sixty years, to begin after the expiration, surrender, or forfeiture (omitting the words "or otherwise"), of the lease to *Anne Seaton*, the said *Edward Earl of Oxford* demised the said manor and ferm of *Blacon* to the said *Geffery Morley*, HABENDUM from the end of the said leases, for fifty years." And if, &c.

So the question was, Whether any of these leases to *Hamlet Freere* or *Morley* be good, and were in esse at the time of the lease made by *Sir Randolph Crew*? for *Sir Randolph Crew* claimed the inheritance of the manor from the *Earl of Oxford*, and *Sir William Norris* claimed the leases from *Morley* and *Freere*, and under him the defendant claimed. And judgment was given in *Chester* for the plaintiff.

And now error was brought of this judgment; and the error assigned in point of law, that judgment was given for the plaintiff, where it ought to have been given for the defendant. And after several arguments at the bar by *ROLLE* and *MASON*, Recorder of London, for the plaintiff in the writ of error, and *CALTHROP* and *SERGEANT HEDLEY*, for the defendant, it was now this Term argued by the Justices *seriatim*; and all the Justices agreed, that the judgment in *Chester* was well given, and should be affirmed.

THE FIRST QUESTION moved was, Whether the lease to *Anne Seaton* was determined after the death of *John Earl of Oxford* who made it, who was seised thereof in the right of his wife, and tenant by the curtesy, or only determinable by the entry of the heir? for if it were only determinable, then, no entry of the heir being found, it was continued, and the reversion was in the *Earl of Oxford* the son at the time of the lease made to *Hamlet Freere*.—But for this point, upon the first argument, *RICHARDSON*, then living, agreed with the other Justices, that it was determined and void by the death of the said *John* then *Earl of Oxford*, tenant by the curtesy, the wife being dead before, and then *Anne Seaton* was but tenant at sufferance, and the freehold in the *Earl of Oxford*, and no reversion; and for that point over-ruled it without further argument; for it is absolutely determined by the death of the tenant by the curtesy; and no acceptance of the rent, or confirmation after by the heir, can make it have continuance. Vide 1. *Edw.* 6. "Acceptance," 19. 2. *Co.* 77. the case of *Harvey v. Thom*, cited 8. *Co.* 34. in *Payn's Case*.

SECONDLY, When the lease to *Rochester* began?—And as to that ALL THE JUSTICES resolved, that it began presently at the time of the sealing, because there was no such lease in esse to *Anne Seaton* at the time of the lease to *Rochester*, but determined three years before prior lease was void in law, Post. 502.—1. *Roll. Ab.* 849. *Hob.* 129. *Co. Lit.* 46. b. 3. *Bac. Ab.* 427.

fore

fore, by the death of the said *Earl of Oxford*; and there was no such lease made to *Anne Seaton* but had other beginning and other ending than is recited; and therefore it began presently. *Vide* 3. *Edw.* 6. Br. "*Leases*," 62. 6. Co. 36. a. in the *Bishop of Bath's Case*; *Plow.* *Throgmorton's Case*; Co. Lit. 46. b. 4. Co. 74. a. Dy. 116.

THIRDLY, The lease to *Rocheſter* being rased in a material part after the sealing and delivery thereof, Whether that rasure be a cause to make the lease void, or if the lease be good notwithstanding this rasure?—And JONES and BERKLEY, *Justices*, held, that the deed is voided by the rasure, but the lease is good, and remains *in esse* notwithstanding this rasure: and as to that took a difference when an estate loseth his essence by a deed, *viz.* where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent-charge, or such like, if the deed be rased after delivery, it determines the estate and makes it void; but when the estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger, that shall not destroy the estate although it destroys the deed; wherefore rasure here doth not make the lease void and determine it.—But I argued to the contrary in this point, that forasmuch as it is a lease by the deed, it is a contract by the deed, and the party himself who hath the interest by the deed rasing that deed, he determines the deed, and his interest by this voluntary act, as if he had surrendered; and the contract being by deed, he may not determine the deed and the covenants, but quoad himself he doth destroy it, but peradventure quoad the lessor it may have essence, if the lessor will; but this is at his election, and not at the election of the lessee. See for this point, 11. Co. 27. Dy. 261. 10. Co. 97. in *Doctor Leyſeild's Case*; 7. *Edw.* 3. 57. 14. *Hen.* 8. 27. per *Brook*, 44. *Edw.* 3. 42. (a).

FOURTHLY, Whether the lease to *Hamlet Freere* be good or void? And that rests upon consideration, whether the lease of the land by the name of a reversion, where it hath the land in possession and hath no reversion (as it is if *Seaton's* lease be determined in fact, and *Rocheſter's* lease be void by the rasure, or that he be not in possession by virtue of the lease, because it is not found that *Rocheſter* entered by virtue of the lease, and so cannot be an estate turned into a reversion), be a good lease?—And for this point ALL THE JUSTICES agreed, that it is merely a void lease; for the grant in the premises is only of a reversion, and it was the intent of the parties to pass the reversion only expectant upon the former leases: and when there is not any reversion, it cannot pass the land in possession; for by the name of a reversion lands in possession cannot pass, but by the name of land a reversion may well pass; for he who will grant lands in possession, will rather grant them in reversion; but not so *à converso*. And although the *habendum* is "to have and to hold" the land, that shall not pass the land in possession, for it is intended he should have the lands so returning.—And deeds are to be construed, that they shall pass things according to the intent of the parties, and the strongest against the grantor

MILLER and  
JOHNS  
against  
MANWARING.

A grant of incorporeal hereditaments is destroyed by an erasure made in the deed after it is delivered; and *quere*, if the interest in things corporeal would survive.

5. Co. 119.  
Co. Lit. 225. a.  
308. 338.  
Cro. Eliz. 626.  
2. Roll Ab. 28.  
1. Roll. Rep. 40.  
2. Bulst. 247.  
Dyer, 27.  
1. Vent. 185.  
297.  
2. Lev. 113.  
11. Co. 27. a.  
3. Bac. Ab. 463.

Tenant in fee grants a lease of the reversion of the said premises after the determination of a lease of them made by his ancestor; the ancestor's lease became void by his death; this second lease therefore is also void, for the lessor being in possession had no reversion to grant.

Ante, 110.

10. Co. 107. b.  
Vaugh. 83.  
Plow. 150.  
Co. Lit. 22. b.

Jones, 355. 3. Com. Dig. 223.

(e) See also as to this point 19. Car. 2. which makes it necessary that all leases for more than three years should be

in writing; and therefore the deed or writing is of the essence of the lease. See 3. Bac. Ab. 464.

according



MILLER and  
JOHNS  
against  
MANWARING.  
Ante, 155.

according to the apparent intent: and here the grant and demise is only of a reversion, and the *habendum* shall enlarge it contrary to the grant; so this lease to *Hamlet Freere* is merely void; and if it be not void, it is determined in time, for it began from the date, and then it is determined by effluxion of time. See express authorities, that by the grant of a reversion, if he hath not a reversion, nothing passeth, *Co. Lit.* 46. 324. b. 10. *Co. Lofeild's Case*. This point is recited to be so resolved, 5. *Co.* 124. b. *Saffyn's Case*; *Plow.* 196. 423. 433. 146. in *Throgmorton's Case*. And where it was said, that the words "and other the premises" would carry it, it was answered, that cannot be, for "other" is always another thing than that before mentioned; and the reversion of the manor of *Blacon* is expressly mentioned, so "other" cannot be extended to it. *Vide* 1. *Co.* 177. a. 35. *Hen.* 8. "Grants," *Br.* 150.

R. 212.

A lease intended to commence in futuro, which mis-recites the prior lease on which it depends in a material point, shall begin immediately. *Co. Lit.* Ab. 427.

THE FIFTH QUESTION was, Whether *Morley's* lease was in esse at the time of this lease made by the plaintiff?—And IT WAS RESOLVED that it was not, for that mis-recites the former leases, and so hath the same rule as the former, where it recites leases and there be not such; therefore it shall begin from the date, which being in 15. *Eliz.* for fifty years, ending 1623. Wherefore for all these reasons the judgment was affirmed.

45. b. *Dyer*, 116. *Plowd.* 148. *Lev.* 77. 2. *Leon.* 11. 24'. *Vaugh.* 73. 3. *Bar.*

CASE 9.

Sir John Stonehouse and Elizabeth his Wife against Sir John Corbet.

In waste, the plaintiff shews a fine to B for life, to A. in tail, to the plaintiff in fee; that A. died, *per quod* B. was seised for life, and committed waste to the disherison of plaintiff: this supplies the omission that A. died without issue.

*Jones*, 354.  
2. *Roll. Ab.* 831.  
*Yelv.* 140.  
*Clift.* 819.  
2. *Saund.* 230.  
234.  
*Hob.* 1. 84.  
*Cro. Eliz.* 57.  
1. *Leon.* 48.  
5. *Com. Dig.* 371.  
1. *Term Rep.* 141.

ERROR of a judgment in the common pleas in waste. Divers errors were assigned concerning the waste, and the proceedings therein; all which being over-ruled,

One main error was assigned *ore tenus* by HENDEN, Serjeant, at the bar, For that in the action of waste he declares, that *Sir Richard Corbet* was seised in fee, and in *Easter Term*, 8. *Jac.* 1. levied a fine of that land to the use of himself for life; and after to the use of *Elizabeth* his wife for her life; and after to the use of himself and the heirs males of his body; and after to the use of *Sir John Corbet*, plaintiff, and the heirs males of his body, and to the use of the heirs of *Sir Richard Corbet*: and that afterwards in *Hilary Term*, 8. *Jac.* 1. the said *Sir Richard Corbet* levied another fine of the same land to the use of himself for life; and after to the use of *Sir John Corbet* and the heirs males of his body; and after to the use of the right heirs of the said *Sir Richard*: that afterwards *Sir Richard* died, and that his wife entered, and was seised for term of her life, the reversion to the plaintiff; and that afterward she married *Sir John Stonehouse*, and committed waste *ad exheredationem* of the plaintiff. The error assigned and insisted upon was, That the plaintiff had not sufficiently entitled himself to the reversion to punish the waste, because he doth not alledge that *Sir Richard Corbet* was dead without issue male; and if he be not dead without issue male, the plaintiff cannot punish this waste: and although the defendant by pleading to the waste, hath admitted it to be to this disinheritation, yet intendment shall not help it, being matter of substance.

But

But it was thereto answered, That forasmuch as it is said she entered and was seised for life, the remainder to the plaintiff, it is intended that *Sir Richard* is dead without issue: also, he alledging it to be done to his disinheritance, that cannot be if the other had any issue alive; and the verdict hath found it to be to his disinherison, by which it is to be intended, that *Richard* died without issue.

Wherefore *BERKLEY* and *MYSELF* held it to be no error; but *JONES* doubted thereof.—Afterward, upon another motion, it was adjudged, that the first judgment should be affirmed. *Vide 5. Edw. 3. pl. 37. 7. Edw. 3. pl. 46. 13. & 14. Eliz. Dy. 304. 10. Co. 63. Ante, 381. Nuper, &c.*

SIR JOHN  
STONEHOUSE  
and his WIFE  
against  
SIR JOHN  
CORBET.

### Bowton against Nicholls.

CASE 10.

**E**RROR of a judgment given in the common pleas; where judgment was given for the defendant, and that judgment here affirmed, and ten pounds costs given here to the defendant upon the statute of 3. Hen. 7. c. 10. (a).

*GRIMSTON* now moved, that costs were not grantable: for the statute is, where judgment is given *against* the defendant or tenant, and he, to delay the execution, brings a writ of error, and the judgment is affirmed, that he shall have costs for delaying his execution. But here the judgment is given for the defendant in the common pleas, so no execution was to be awarded there against him; but the plaintiff was barred: and although the plaintiff brought the writ of error, and the judgment is here affirmed, yet it is out of the statute.

ALL THE COURT were of this opinion, upon consideration of the statute; wherefore a *superfedeas* was awarded to stay execution for the costs.

The defendant shall not have costs on a writ of error brought by the plaintiff in the original action; for no execution is thereby delayed.  
Ante, 145. 175. 363  
Cro. Eliz. 617.  
Cro. Jac. 636.  
2. Andr. 123.  
1. Bac. Ab. 524.  
4. Mod. 7.  
2. Com. Dig. 555.  
Doug. 751. in notis.

(a) But now by 13. Car. 2. st. 2. c. 2. if error be brought of a judgment after verdict, and the judgment be affirmed, the defendant in error shall have double costs; and by 8. & 9. Will. 3. c. 11. if

the plaintiff, after any judgment for the defendant, sue error, and afterward discontinue, or be nonsuited, or have judgment against him, the defendant shall have costs.

Easter

the first of these is the fact that the  
the second is the fact that the  
the third is the fact that the

the fourth is the fact that the  
the fifth is the fact that the  
the sixth is the fact that the

the seventh is the fact that the  
the eighth is the fact that the  
the ninth is the fact that the

the tenth is the fact that the  
the eleventh is the fact that the  
the twelfth is the fact that the

the thirteenth is the fact that the  
the fourteenth is the fact that the  
the fifteenth is the fact that the

T  
the  
An  
the  
wh  
kin  
in  
too  
3-  
is t  
con  
to  
Ke  
to l

A  
be,  
pay  
of  
lam  
two  
out  
the  
furn  
nee  
cuff  
to a  
furn  
My  
and  
part



## Easter Term,

11. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*} *Justices.*Sir John Banks, *Knt. Attorney General.*Sir Edward Littleton, *Knt. Solicitor General.*

## Memorandum.

CASE 1.

THE first Saturday of this Term, being 18th April 1635, SIR JOHN BRAMPSTON, *Knight*, of the *Middle-Temple*, one of the King's Serjeants, was made Chief Justice of the King's Bench. And first the Lord Keeper made a grave and long speech, signifying the king's pleasure for his choice, and the duties of his place: to which, after he had answered at the bar, returning his thanks to the king, and promising his endeavour of due performance of his duty in his place, he came from the bar into court, and there kneeling, took the oaths of supremacy and allegiance according to the statute 3. Jac. 1. c. ∴ then standing he took the oath of Judge; which is the same oath that all other Judges take: then he was appointed to come up to the bench, and then his patent (which was only a writ to attend the office) being read by BROOME, *Secondary*, the Lord Keeper delivered it to him. But JONES said, that the patent ought to have been read before he came up to the bench.

SIR BRAMPSTON appointed Chief Justice of the King's Bench. Ante, 225.

R. 125.

R. 125.

## Anonymous.

CASE 2.

A PROHIBITION was prayed by GRIMSTON to the spiritual court for suing for tithes of lambs; surmising the custom to be, That if one hath lambs under the number of seven, he ought to pay a halfpenny for every lamb under that number in lieu of all tithes of lambs; and if he had but seven, the parson should have the seventh lamb, and should pay threepence; and if he had eight, he should pay twopence; and if he had ten, the parson should have the tenth without paying any thing.—BERKLEY and JONES, *Justices*, held, that the canon law is so, and so received in the spiritual court: and it is surmised, that the spiritual court allows of it; and therefore there needs not any prohibition. But because it was alledged that it was a custom, and the parson would stay until the tenth, and would refuse to accept according to the custom, and that in the spiritual court this surmise is not allowed; therefore BRAMPSTON, *Chief Justice*, and MYSELF conceived, that a prohibition is grantable for that cause: and JONES and BERKLEY agreed, that it should be granted; and the party might demur if he would.

To pay a penny for every lamb under the number of seven, or the seventh lamb, the parson paying twopence, &c. is a good modus. 1. Roll. Abr. 648. 651. Cro. Jac. 42. Latch. 254. Dougl. 204.

A prescription not to pay tithes of aftermowth in consideration of making the first tithes into hay is good.

Cro. Eliz. 660. Moor, 910.

Tithe of bees may be discharged by a custom to pay tithe of their honey, wax, and the expences of hiving them.

Post. 595. F.

Also, for tithes of aftermowth, that there is a custom, in consideration that he should make the first tithes into good and sufficient hay, and set it out in cocks sufficiently dried and ready to carry, that he should be discharged from the payment of tithes of the aftermowth. — And THAT WAS HELD a good suggestion, by reason of the costs he bestowed in making it to be perfect hay.

Cro. Jac. 42. 116. 12. Mod. 498. Bunb 10. 314. 3. Com. Dig. 94. 1. Roll. Ab 640. Hob. 250. Dougl. 204.

AND upon a surmise made that he was sued for tithes of bees, that in consideration he paid honey and wax, and was at the charge for hives and maintenance of them in winter, he should be discharged of the tithes of the bees themselves. — And upon these surmises a prohibition was granted, being one of the first cases moved after BRAMPSTON was made Chief Justice.

N. B. 51. 1. Roll. Ab. 651. 3. Com. Dig. 99. Dougl. 204.

#### CASE 3.

Although it appear upon the proceedings that an action was not brought within the time of limitation, yet the defendant cannot take advantage of it on motion, but must plead the statute.

Vide ante, 381.

Ld. Raym 838.

#### Hawkings against Billhead.

Trinity Term, 10. Car. 1. Roll 1312.

**ACTION FOR WORDS.** Whereas the plaintiff was of good name and fame, and of a chaste conversation, and divers had offered to marry unto him their daughters; and whereas he was in communication with one *William Russel* to marry his daughter, and the said *William Russel* was willing to have his daughter to match with him, and offered forty pounds in marriage; that the defendant, having communication with one *J. S.* and others of the plaintiff, on the twentieth of *September, 7. Car. 1.* to discredit the plaintiff and hinder him of his marriage, said of the plaintiff, "That the plaintiff had lain with such a woman and others, and them carnaliter cognovit;" by reason whereof the said *William Russell* utterly refused to give his daughter to match with him; and that he caused the plaintiff to be prosecuted in the archdeacon's court for that incontinency; and thereupon he brought his action in this court in *Michaelmas Term, 10. Car. 1.* The defendant pleaded not guilty; and found against him.

And now *MAYNARD* moved in arrest of judgment, that these words being spoken 20th *September, 7. Car. 1.* and the action being brought in *Michaelmas Term, 10. Car. 1.* (whereas it ought to be brought within two years by the statute of 21. *Jac. 1.* of limitations) by his own shewing, it is brought for words spoken above two years; and therefore he is to be barred of this action.

But because he had admitted the action, and had not pleaded the statute of limitations, but not guilty; *JONES* and *BERKLEY*, Justices, held, that he shall not now have advantage thereof. And *JONES* said, that he knew it had been ruled so twice in the time of the *LORD LEA*, Chief Justice, and in the time of *SIR RANDALL CREW*, Chief Justice; for otherwise there should be a mischief in this court more than in another court, viz. in the common pleas, where they prosecute by original and outlawry; and if the outlawry be reversed, the statute aids the plaintiff. But here they proceed by *latitat*, where by the cause of the action doth not appear, and may peradventure divers years continue by process, before the defendant may be arrested (b): and the plaintiff in his declaration needs not shew the cause wherefore he did not commence his suit sooner; for if he should do so, the declaration would be more prolix than was convenient.

(b) Ld. Raym. 383. 435. 885.

venient. But if the defendant pleads the statute of 21. Jac. 1. c. . . HAWKINGS  
then the plaintiff by the replication ought to shew good cause why he *against*  
did not bring his action within the time limited by the statute (a), BILLHEAD.  
otherwise he is to be barred; for the statute allows of many imped- (a) 2 Burr. 961.  
iments, viz. infancy, imprisonment, *ouster le mer*, and others therein  
mentioned, which shall be sufficient causes that the action was not  
brought sooner (b).

But I doubted thereof, because by his own shewing, it appears (b) Stra. 836.  
that the action is not brought within the time limited by the statute, I. Wilf. 134.  
and the statute is in the negative, "that it shall not be brought but 2. Wilf. 145.  
"within the time;" so the Court *ex officio* ought to abate it, unless Dougl. 656.  
he had shewn wherefore it was not brought within the time.

But by the opinion of THE OTHER JUSTICES it was adjudged  
for the plaintiff, unless other cause, &c.

The Case of Baker *against* Hacking.

CASE 4.

*Vide Ante*, Page 387.

THIS case was now this Term argued at the bar, and after at A lease for life  
the bench. And BRAMPSTON, JONES, and BERKLEY, Jus- not warranted  
tices, argued, that the devise was void; for they all held, that the by 32, Hen. 8.  
lease for life is only the lease of the tenant in tail during his life and c. 28. made by  
the life of the lessee, and then it is a discontinuance, and the rever- a tenant in tail  
sion taken from him in reversion is displaced; and then he, having and the rever-  
nothing in the reversion but only a right, cannot make a devise, for sioner in fee, is  
the lease being a lease for life, rendering a pepper-corn, is not war- a discontinuance  
ranted by the statute of 32. Hen. 8. c. 28. and then being a lease for not only of the  
life of the lessee, the livery is only made by the tenant in tail, for he estate in tail,  
hath the sole power of the immediate freehold and the immediate but of the re-  
possession and inheritance: then when they make a lease for life, it is version also,  
an immediate wrong to the intail, and discontinues the estate-tail notwithstanding  
during the life of the lessee; and the tenant in tail hath gained a new the fee is in the  
fee, and is seised of a reversion in fee expectant upon the estate for reversioner by  
life during the lease, and it is a new reversion in the plaintiff. And the death of the  
that they relied upon THE YEAR-BOOKS 11. Hen. 7. and 13. tenant in tail  
Hen. 7. If there be tenant in tail, remainder to his right heirs, he without issue,  
may be restrained by a condition not to alien, for his feoffment is provided the  
there held a discontinuance. And JONES cited a case adjudged, lessee survive.  
and *Cromwell v. Andrews* (a): Tenant in tail, remainder to his 1. Roll. Ab. 633.  
right heirs, makes a feoffment by deed, and delivers the deed to the 2. Roll. Ab. 59.  
lessee, and after livery is made by an attorney; the question was, 121.  
Whether the remainder passed by the delivery of the deed? for then 1. Lev. 36.  
livery to him in remainder had not been a discontinuance. But it Co. Lit. 224.  
was resolved, that it was a discontinuance; and there is no difference 326. 335.  
when tenant in tail, remainder to his right heirs, makes a feoffment, Moor, 91. 281.  
and when he in reversion and tenant in tail join in a lease for life, 2. And. 210.  
which is a discontinuance; and it is a discontinuance presently, Lut. 732.  
it cannot be a discontinuance by the death of the tenant in tail 3. Com. Dig. 76.  
leaving issue; for, as BRAMPSTON said, the change of the reversion Pow. Dev. 35.  
Bull. N. P. 100.  
3. Com. Dig. 76.  
Cowp. 702.  
H. Bl. Rep. 269.

(a) Cro. Eliz. 15.



BAKER  
against  
HACKING.

is presently by the livery or not at all, and it is not changed by the death of the tenant in tail having issue; and that being a lease for the life of the lessee, cannot be construed to be a lease for the life of the tenant in tail (as it shall be construed if it be not a discontinuance), and after his death without issue, a lease for life against him in reversion. Wherefore they all concluded, that it was a discontinuance, and judgment ought to be given for the defendant.

Bull. N. P. 100.  
1. Lev. 36.

But I argued to the contrary, that is not any discontinuance, nor the reversion displaced: FIRST, Because it shall not be taken to be a tortious lease and a discontinuance, when by any means it may be construed a good and rightful lease; and it may be here so construed, when tenant in tail and he in reversion join, for it is an estate derived out of both their estates, viz. a lease of the tenant in tail as long as he lives, and afterward of him in reversion, as *Treport's Case (a)* is resolved. SECONDLY, It is no discontinuance, because they join in the lease, for he in reversion joins in the act of making of this lease, and so it is not the intention of any of the parties to disinherit him in reversion, and to take away or displace the reversion: wherefore the law shall not make any such construction; especially here, when tenant in tail is dead without issue, there is not any issue against whom there should be a discontinuance; and it is not a discontinuance to the reversion, because he joined. To prove this was vouched *Bredon's Case (b)*. And an act may be a discontinuance now, and not a discontinuance by matter *ex post*; as if tenant in tail infeoff him in reversion and a stranger, and he in reversion survive, it is no discontinuance. So if husband and wife make a lease for life, by deed, of lands of the wife, if the wife, after the death of the husband, agree, it is no discontinuance; but if she disagree, it is a discontinuance. So here, if tenant in tail had died having issue, it might have been a discontinuance against the issue; but if otherwise, it is against the intent of the parties to construe it to be a discontinuance when tenant in tail hath no issue.

But ALL THE OTHER JUSTICES held it to be a tortious act in itself, and that although he hath not afterward any issue, it is not material: wherefore it was adjudged for the defendant.

(a) 6. Co. 14. Co. Lit. 45. a.

(b) 27. Hen. 8. pl. 13. 1. Co. 76. a.

#### CASE 5.

#### Mayo against Cogshill.

In ejectment  
against husband  
and wife, if HE  
is acquitted,  
and SHE is  
found guilty;  
judgment *quod*  
*capiantur*,  
against both,  
is not error.  
Post 513. contra.  
Hob. 98. 100.

**E**RROR of a judgment in ejectment against husband and wife. The defendants pleaded not guilty, and the wife was found guilty, and the husband found not guilty; and judgment against the husband and wife, *quod capiantur*.

The error was assigned for this cause, Because the judgment ought to have been against the wife, *quod capiat*, and not against the husband where he is acquitted, for he ought not to be imprisoned for his wife's offence.

Cro. Eliz. 381. 1 Roll. Ab. 221. Moor, 704. Cro. Jac. 203. 440. 9 Co. 72.  
Stra. 1167. 1237. Will. 149.

MAYO  
against  
COGSWILL.

But ROLLE, for the defendant in the writ of error, moved, that it is not any error, and that the judgment in this case ought to be against them both, *quod capiantur*; for it is only for the fine to the king, and the imprisonment is no longer but until the fine be paid, and the husband ought to pay it, for the wife cannot. And to prove this he cited a precedent in this court, *Lewes v. White (a)*, where, in a writ of error upon a judgment in the common pleas, in trespass against husband and wife, they pleaded not guilty, and the husband was acquitted, and the wife only found guilty; and the judgment was against them both, *quod capiantur*: and it was assigned for error for this cause, and the judgment affirmed. And BROOM, the Secondary, said, that so are all the precedents of this Court.

THE COURT therefore here awarded accordingly, that, notwithstanding this error, the judgment should be affirmed.

But then another error was assigned, That in the declaration there was not *vi et armis*; and upon view of the record it appeared, that it was in the writ *vi et armis intravit*, &c. but in the count it was omitted.—Wherefore for this cause the judgment was reversed (b). Judgment in trespass reversed for want of *vi et armis* in the declaration.

1. Hen. 6. 13. 1. Hen. 7. 19. 1. Roll. Ab. 221. F.N.B. 86. Cro. Jac. 443. 526. 536. Salk. 636.  
1. Saund. 81. Ld. Raym. 985. Carth. 66. 1. Bac. Ab. 92.

(a) Cro. Jac. 203.

5. Bac. Abr. 191. Carth. 390. 5. Mod.

(b) See 16. & 17. Car. 2. c. 8. 5. & 285. Runn. Eject. 121.

6. Will. & Mary, c. 12. 4. Ann. c. 16.

D d 2

Trinity

# Trinity Term,

11. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

## CASE 1.

Busshell, Hurstwayt, and Brand, *against* Yaller.

*Trinity Term, 10. Car. 1. Roll 456.*

The principal and bail cannot join in a writ of error on the principal judgment.

Ante, 300.  
Post. 481. 561.  
575.

Cro Jac. 384.  
Hob. 72.  
Godb. 440.  
1. Lev. 137.  
2. Bac. Ab. 199.  
1. Term-Rep. 279.  
2. Term Rep. 69.

**E**RROR of a judgment in the common pleas, by *Busshell* the defendant, and *Hurstwayt* and *Brand* the bail, in the common pleas, *against* *Yaller*.

*GRIMSTON* assigned for error, That no *capias* was awarded against the principal, and yet a *scire facias* issued against the bail, and judgment against them.

It was now moved, that this writ of error brought by the bail and the principal was not good, for they ought not to join in a writ of error; for the bail may not avoid the judgment against the principal by any error which is in the proceeding, and the principal hath nothing to do with the judgment against the bail.

And ALL THE JUSTICES were of that opinion, except *BERKLEY*, who doubted thereof, because by the judgment against the principal the bail is damnified; wherefore he conceived they should join in the error to avoid the principal judgment. But he agreed, that the principal ought not to join in a writ of error to reverse the judgment against the bail; and afterward he consented with the other justices that a writ of error lies not in this manner. Wherefore it was abated.

## CASE 2.

*Townsend against* Hunt.

*Hilary Term, 11. Car. 1. Roll 774.*

An *assumpsit* will lie, although the consideration be executed in part; as if the defendant promise to pay the residue of a legacy in consideration of the plaintiff having at the defendant's request, executed a general release to his wife executrix.

**A**SSUMPSIT. The plaintiff declares, Whereas *Francis Townsend* made his will, and thereby devised to the plaintiff three score pounds, to be paid at his age of one-and-twenty years; and made *Anne* his wife his executrix, and left assets to pay his debts and legacies; and that the said *Anne* took the defendant to husband and afterwards the plaintiff came to full age; and the defendant and his wife paid to the plaintiff, in part of payment of the legacy, upon the 23d of *April*, three-and-fifty pounds, who gave to the defendant and his wife a general release; that the defendant 28 September, 5. Car. 1. in consideration that the plaintiff, at defendant's request, had made a general release to the defendant and his wife, assumed to the plaintiff, that if his wife did not

Ante, 223. S. C. Jones, 365. 1. Roll. Ab. 13. Dyer, 172. 2. Leon. 223.



the seven pounds residue of the said legacy in her lifetime, that he would pay it after his (the said defendant's) wife's death: and alleges in fact, that the defendant's wife did not pay the said seven pounds in her life, and that he had required it of the defendant, and he had not paid it, *per quod actio accrevit*.

Upon this declaration the defendant demurred; and it was argued at the bar by FARRER *for the plaintiff*, and by CALTHROP *for the defendant*. And he shewed for cause of his demurrer, that this promise, being for a consideration past, is a void promise; and here is not a continuing consideration, but *nudum pactum unde non oritur actio* (a): and compared it to the case in 10. Eliz. Dyer, 272. a (a) 1. Roll Ab. where one promised to one who was bail for his servant, to save him harmless, it was adjudged a void promise.

BERKLEY, *Justice*, for this reason, was of that opinion: but if it had been a consideration continuing, as in consideration of marrying his daughter or cousin, which is a gift in frank-marriage, it had been good, but not here, no more than if in consideration you gave him an horse a year since he had promised to pay you ten pounds, which is void, because past.

But JUSTICE JONES and MYSELF, upon the first motion, conceived it good; for if this promise had been made at the time of the release made, it had been clearly a good promise and a good consideration; then being made after the release, forasmuch as the release is made at the defendant's request (b), and the defendant hath the continuance of the benefit thereof, the promise upon this consideration is good enough: for so the case imports in Dyer, 272. If the bail had been entered into at the master's request, and afterwards he had made the promise, it had been well enough. And for this purpose they vouched the case of *Marsh v. Rainsford* (c); and another case here of *Riggs v. Bullingham* (d), where, in consideration that the plaintiff, at the defendant's request, had granted the next avoidance of such a church, the defendant, at a day after, promised to pay to the plaintiff one hundred pounds. After verdict upon *non assumpsit*, it was moved in arrest of judgment, FIRST, Because there was no time or place mentioned when that grant was made.—*Sed non allocatur*; because it was but an inducement to the action.—A SECOND EXCEPTION, Because it was a consideration past, and it might be twenty years before.—*Sed non allocatur*; because it was made at the defendant's request.

Afterwards, in *Michaelmas Term*, 11. Car. 1. the principal case being moved again, ALL THE JUSTICES, *seriatim*, delivered their opinions, that it was good; and it was adjudged for the plaintiff,

(c) Danv. 37. p. 25. 2. Leon III.

(d) Cro. Eliz. 715.

TOWNSEND  
against  
HUNT.

Plowd. 302.  
Cro. Eliz. 59.

194.  
Moor, 866.  
Cro. Jac. 18.  
Hob. 10.  
1. Com. Dig.

142.  
3. Salk. 96.

(a) 1. Roll Ab.  
11.

Moor, 220.  
Cro. Eliz. 193.

442. 885.  
3. Lev. 98 366.  
Stra. 592.

(b) 1. Roll Ab.

11. p. 20.  
3. Lev. 366.  
Stra. 933. in  
point.  
1. Com. Dig.

142.

Continuing  
consideration.

### The King against Sir Basil Brook.

CASE 3.

SCIRE FACIAS. *Quare non satisfecit* a fine assessed upon him at the justice-seat in the Forest of Dean. The plea was, that the justice-seat was at Gloucester, which is out of the Forest. And thereupon it was demurred, because the beginning of the justice-seat was within the Forest, though after adjourned to Gloucester.—

A *scire facias*  
will lie for a fine  
at the justice-  
seat of a forest,  
though held out  
of the forest.

And 1. Roll Ab. 534.  
4. Bac. Ab. 410

THE KING  
against  
Sir BASIL  
BROOK.

And ALL THE COURT held it good enough, that the justice-seat being begun at a place within the Forest, it may be adjourned to a place out of the Forest, &c. Wherefore it was adjudged for the king.

See statute 7. Rich. 3. c. 3.

CASE 4.

The King against Mynn.

Proceedings in  
the Forest  
Courts may be  
removed into  
the King's  
Bench.

SCIRE FACIAS, where such judgment was given against him, he being found a *trespasser*, for cutting trees within the Forest without licence; and the proceeding against him being removed by *certiorari* out of the chancery, and by *mittimus* sent into the King's Bench, he pleading such plea, and demurrer thereupon—IT WAS ADJUDGED for the king.

CASE 5.

Smith against Smith.

On judgment  
against an in-  
fant, he shall  
not be amerced.  
Ante, 161.  
Post. 421. 574.  
5. Co. 49.  
8. Co. 62. b.  
Co. Lit. 127. a.  
Cro. Jac. 628.

ERROR of a judgment in *dower*. The record certified the defendant in *miseriordia*, and the error intended to be assigned was, Because the defendant, being an infant, and appearing by guardian, ought not to be amerced. The defendant moved in the common pleas to have it amended, and it was amended, and made *nihil in misericordia quia infans*; and upon a writ of *certiorari* this amendment was certified.

Dyer, 338. 1. Roll. Ab. 214. 4 Com. Dig. 177.

And it was moved by GRIMSTON, that it should be amended in this court, and the judgment should be affirmed.

I doubted if such amendment might be upon *diminution* alledged in the record against the record certified in point of the judgment. —But because it being now certified, that the record at the first was mis-certified, the Court here would not intend that it was amended after the judgment entered, but that the record in the court there (in the judgment) was well entered at the first, and not mis-entered. And that being in case of *dower*, and after verdict, which were to be favoured, THE COURT AGREED, that such *certiorari* to aid the judgment was well awarded. And the record was amended accordingly, and the judgment affirmed.

3 Lev. 344.  
Salk. 49.  
1. Bac. Ab. 108.

CASE 6.

William Reve against Malster and Barrow.

Hilary Term, 9. Car. 1. Roll

A copyhold and a freehold *Borough English* are alike; both shall descend, by custom, to the youngest son; and if a copyhold be surrendered to use for life, and the youngest son die before that estate determine, it shall not by the custom descend to his next youngest brother, for the custom only extends to youngest sons. *Sed quare*, If he shall not have it as heir to the father? or, Whether the eldest son shall have it as heir to the youngest brother?—S. C. 1. Roll. Ab. 614. 624. 1. Jones, 631. 1. Com. Dig. 609.

TRESPASS for entering into certain lands called *Hoo-Green*. Upon not guilty pleaded, a special verdict was found, whereby it appeared, that *George Reve*, copyholder in fee of the land in question, being parcel of the manor of *Hoo*, where the custom is, that the land is of the nature of *Borough English*, descendible to the youngest son, had issue three sons, *William* the plaintiff, *George*, and *Charles*, and surrendered that copyhold to the use of himself and *Anne* his wife, and his heirs; and they were admitted accordingly. Afterward *George* the father died seised of this reversion, which descended, 2. Jac. 1. to the said *Charles* his youngest son. *Anne*

enters and enjoys it; and afterward, in 12. Jac. 1. Charles died without issue. Afterward Anne, in 6. Car. 1. died: William Reve, the eldest son, was admitted and entered. George Reve, the second son, enters and claims that land, and surrenders to the use of the defendant Malster, who was admitted; upon whom William the plaintiff entered; and he, and the other defendant as his servant, re-entered; whereupon this action was brought. *Et si super totam, &c.*

This matter was argued at the bar, and after at the bench; and it was argued at the bench by JONES, Justice, and by MYSELF, for the plaintiff; and BERKLEY, Justice, and BRAMPSTON, Chief Justice, for the defendant.

The sole question was, Whether William Reve, son and heir of George Reve, who created this reversion, and brother and heir of Charles, who had this reversion as youngest son and heir in Borough English, or George, the middle son, shall have this reversion?

FIRST, It was agreed by them all, that George cannot have it, as brother and heir of Charles, by the custom, because the custom is only to extend to the youngest son, and not amongst brothers, where no such custom is found; and without a special custom found, that it shall descend to the youngest brother (a), the law will not admit it, because customs ought always to be taken strictly (b); and so it was resolved in *Ballard's Case*, for a copyhold in *Tottenham* (c).

SECONDLY, It was agreed by them all, that although Charles never was admitted, but died before admittance, it is not material, for it is all one as if he had been admitted; for he was a copyholder, and might have surrendered, or charged, or let, &c.

THIRDLY, They all agreed, that betwixt a copyhold in Borough English, and a freehold in Borough English there is not any difference (d); and that if Anne the mother had died in the life of Charles, and Charles, surviving, had entered and died without issue, then William should have the land as heir of Charles.

But the great question was, this being a reversion expectant upon an estate for life, and Charles never being seised of the lands in possession, but dying in the life of the tenant for life without issue, Whether George, as youngest son, may claim it, or that William, as heir at the common law, shall have it?

BRAMPSTON, Chief Justice, and BERKLEY, argued strongly, that George, the middle brother, should have it, and by consequence the defendant, who claimed under him, as if Charles had never been born or in esse; for there being a reversion expectant upon an estate for life, and the tenant having the possession, George shall make his title from his father, and take by descent from him who had the seisin of the freehold, and not make any mention of him who had but the reversion expectant upon an estate for life (e): and compared it to the case of a brother of the half-blood; although the eldest son survive the father, yet he may claim it by descent from his father, when

REEVE  
against  
MALSTER and  
BARROW.

4. Co. 21.  
Moor, 123.  
4. Leon. 38.  
Co. Copy. 113.  
Dyer, 292.  
1. Roll. Ab. 502.  
2. Bac. Ab. 33.  
Co. Lit. 14. b.  
1. Peere Wms. 67.

1. Term Rep. 466.

(a) Co. Lit. 110. b.

(b) 2 Lev. 138.  
1. Roll. Ab. 623.  
4. Leon. 242.  
Cro. Jac. 198.

(c) Tothill, 108.  
1. Com. Dig. 608.

(d) 3. Peere Wms. 63.

Salk. 243.  
6. Mod. 120.  
Ld. Raym. 1024.  
2. Keble, 138.

Co. Lit. sec. 8.

(e) This opinion approved by HOLT, Ld. Raym. 1024. 1. Peere Wms. 63. Chief Justice, in the Case of *Clement v. Co. Lit. 151. L. C. B. Parker's Manuscript*, Mod. Cases, 122. Salk. 243.



REVE  
against  
MALSTER and  
BARROW.

1. Com. Dig.  
608.  
2. Bac. Ab. 30.

the eldest had not possession and died without issue, as 40. *Edw* 3. pl. 9. and 7. *Hen*. 5. pl. 2. and if the father died in possession, and the eldest son, surviving, died before entry, the second son, although he were of the half-blood, shall have it, he claiming by descent from his father; and never shall make mention of his brother, although in some respects he was a tenant, to alien and change. But in all actions and writs where he conveys by descent, there shall not be any mention of any but of those who took the estate and had seisin, and not from others who never had seisin, the law esteeming them as if there never had been any such persons; as in *Fitz*. "Recovery," 212. and 8. *Co*. 88. b. *Buckmer's Case*; and by consequence he may claim here as youngest son by the custom, as heir in Borough English, as if *Charles* never had been, because he hath it by descent, and in course of a descent.

1. Roll. 624.

But against that JONES and MYSELF held, that *William*, the eldest brother, had the better title; and we agreed to all the cases put of descents, or conveyed by descent at the common law. But in this case the youngest son hath it by custom; for he being youngest son at the time of the death of his father, that makes him heir in Borough English by the custom; and for this cause none can be said to be heir in Borough English to his father so long as his father lives. See 6. *Co*. 22. a. *Gorge's Case*. And when the youngest son is heir, in whom it vests by the custom, it is an inheritance fixed in him; and the custom hath its operation in him, and none may claim that after but he who is heir unto him: and therefore we held, that the youngest son who is *in esse* at the time of the death of his father, only shall have it by the custom. And if a man hath issue two sons, and, being seised of land in Borough English, dies seised of that land, his wife *privement enseint* of a son, the son *in esse* shall have it by the custom, and the son born after shall not divest him, because he was not youngest son at the time of the death of his father. *Vide* 5. *Edw*. 4. pl. 6. 9. *Hen*. 7. pl. 15. 30. *Aff*. 47. If land vests in an heir by reason of a contingency, although another heir more near comes after *in esse*, it shall never be divested; and he who will after claim ought to claim from him in whom the estate vested (a). So here this reversion, vesting in the youngest son by the custom, is *quasi* by a contingency, and he is named heir *per accidens*, as in *Ratcliff's Case*, 3. *Co*. 38. a. and he is *quasi* a purchaser of that reversion; wherefore when he dies without issue, it shall descend to him who is his heir, which is the eldest son: and he is his heir to his youngest brother, and also heir to his father, who was last seised of the reversion; and there is no reason but he should have it as heir to his brother and to his father. And this case is not like to the cases put, where they claim merely by the common law.

1. Com. Dig.  
608.  
3. Com. Dig. 60.

And whereas it was held by BRAMPSTON and BERKLEY, that *George*, the youngest son, should have it as heir in Borough English, because he is the youngest son when the *feme* died, and the reversion fell in possession:

But that was utterly denied by JONES and MYSELF; for he was not youngest son when his father died, and none may have it by

(a) See the 10. & 11. Will. 3. c. 16.

that custom, but he who is youngest son at the time of the death of the father: for as it is said, that such an one *est primogenitus ejus filius*, and heir at the common law; so in Borough English, that such a one *est minimè natus* at the time of the death of his father, and heir unto him according to that custom: and he who is the middle son at the time of the death of his father, cannot be said to be the youngest son at that time, and therefore not within the custom. Wherefore, &c.

REVE  
against  
MALSTER and  
BARROW.

1. Peere Will.

67.

See Salk. 244.  
and 1. P.W. 69.

(a) See Clements v. Scudamore, 1. Peere Will. 63.

Anonymous.

CASE 7.

**E**RROR of a judgment in *Coventry*. The error assigned and insisted upon by MAYNARD was, That the verdict found 5l. for damages, and 26s. 8d. for costs. And the Court awarded, that he should recover the damages and costs assessed by the jury; and further, that he should recover 53s. 4d. *de incremento ad requisitionem* the plaintiff; and he doth not say *pro misis suis*, according to the usual course of the precedents; and it might be the *incrementum* was *pro damnis*.—And ALL THE COURT (except BERKLEY) held, that it was well enough: for it shall be intended *pro misis*, which was the last antecedent, and that which might lawfully be increased, and not *pro damnis*; which cannot be increased. Wherefore the judgment was affirmed.

Judgment for  
damages and  
costs, and so  
much *de incre-*  
*mento*, &c. is  
good, without  
saying *pro misis*.

Michaelmas

# Michaelmas Term,

II. Car. I. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

## CASE I.

### King against Fitch.

Trinity Term, 9. Car. I. Roll 213.

In waste, for several wastes in several places entire damages may be given.

Ante, 328.

Post. 452.

Roll. Ab. 569.

570. 673.

3. Bull. 258.

Dyer, 369.

10. Co. 130.

3. Lev. 324.

Stra. 910.

2. Com. Dig.

625.

2. Crompt. Prac.

313.

Bull. N. P. 120.

**E**RROR of a judgment in waste in the common pleas; where judgment was, upon default of the defendant, that a writ of enquiry of waste should be awarded.

MAYNARD assigned for error, FIRST, Because the waste being assigned in three houses, two gardens, &c. upon the writ of enquiry, waste was found in the houses and gardens, and entire damage given. And it was alledged, that several damages ought to be given for every of them, so as it might appear to the Court what damages were in every of them; for if it were small in any of them, viz. under 12d. it is so little that the Court would not adjudge it waste; and being assigned in several houses, it ought to appear to the Court how much is the waste of every of them by itself particularly. *Vide 9. Hen. 6. pl. 67.—Sed non allocatur*: for when the sheriff and jury have had the view, and given damages for the waste, it shall not be intended that damages in any; and the usual course is in all precedents to find entire damages.

In inquest of office there may be more or less than twelve jurors.

F N. Br. 107.

Finch's Law,

484.

2. Hale, 161.

Co. Lit. 155.

THE SECOND ERROR, Because upon the writ of enquiry of waste thirteen jurors were returned to be sworn, where there ought to be but twelve: for it is not like to other writs of enquiry, where it is usual to have more than twelve, at the sheriff's pleasure; for that is but a mere inquest of office: but here it is a verdict, and in nature of a verdict, wherefore an attain lies. *Vide 3. Hen. 6. pl. 29.—E adjournatur (a)*.

2. Roll. Abr. 673. 2. Com. Dig. 25. 5. Com. Dig. 370.

(a) *Vide Post. 452.*

## CASE 2.

### Acton against Symon.

Michaelmas Term, 10. Car. I. Roll 83.

An *assumpsit* lies on an express promise to pay rent, in consideration that the plaintiff would demise the lands on which it is reserved.

**A**SSUMPSIT. That the defendant, the twenty-fifth day of April, 3. Car. I. in consideration the plaintiff would demise to the defendant the moiety of an house and certain lands for three years for the rent of twenty-five pounds a-year, payable at Michaelmas and the Annunciation, assumed to pay the said rent at the Feasts: and alledges in fact, that *postea* the same day he demise the said lands to the defendant *in forma prædictâ*, and that he enjoyed the lands accordingly during the three years, and had not paid his rent.

1. Com. Dig. 115. S. C. Jones, 364. S. C. I. Roll. Abr. 8.



The defendant pleads a *surrender* of the said lands before any of the Feasts for which the breach was assigned, and acceptance thereof.— And hereupon they were at issue; and found for the plaintiff.

ACTION  
again:  
SIMON.

GRIMSTON now moved in arrest of judgment, that the action lies not, because it is grounded upon a personal promise in a real contract; which real contract being executed, the *assumpsit*, which is merely personal, is determined; and the rent being real, he cannot bring this action for the non-payment thereof.

But JONES, BERKLEY, and BRAMPSTON, *Chief Justice*, conceived it lies, for it is a collateral and absolute promise; but if it had been an implied promise, as upon a sale of goods, &c. this action lies not. But there being an express and direct promise alledged, which is in a manner confessed by the defendant by his plea in bar, the action lies, as if he had covenanted by deed, or were obliged by an obligation to pay the rent; and so this promise is good (a).

Cro. Jac. 598.  
668.  
1. Roll. Ab. 89.

But I doubted thereof, because it is a personal contract: and by the lease made the personal contract is determined; for it is in vain to have an *assumpsit* where he may have *debt* upon the lease, and thereby recover the debt and damages for the forbearance: and in this action no *gager de ley* lies; and then there is no cause to have this action.

GERMYN urged, that if this action were maintainable, then the defendant could not plead *eviction* or suspension of the rent by entry into part of the land.

To an *assumpsit* on an *express promise* to pay rent pursuant to the terms of a demise, the defendant may plead *eviction*, &c.

But ALL THE COURT denied it; for notwithstanding this promise, it is a rent as before; and if it be determined as a rent, the promise for the rent is also discharged; whereupon by the said three Justices it was adjudged for the plaintiff.

But we all agreed, that there ought to be an *express promise* proved, if he had pleaded "*non assumpsit*;" and that an *implied promise* would not have served.

On a *special assumpsit* for rent, the plaintiff shall recover all the arrears in damages.  
Ante, 6. 343.

BERKLEY held, that if he recovered damages to the value of the rent arrear, it may be pleaded in bar to an action of debt for the rent; but BRAMPSTON, *Chief Justice*, and I denied it.

Yelv. 84. Cro. Eliz. 57. 240. Cro. Jac. 110. 1. Sid. 279.

BERKLEY said, if one borrow money, and promise to enter into bond to pay it at a day to come, and promise that he will keep his day of payment, and afterwards he makes an obligation for the payment of this money at the day, if he fail of the payment, debt may be brought against him upon the obligation, and he may also maintain an action of the case on the promise; but I denied it, because the obligation determines the contract.

To an *assumpsit*, the defendant may plead a *bond* given for the recovery, for the bond determines the contract.

Clift. 199. Cro. Jac. 33. 234. 1. Willf. 332. Cowp. 128.

(a) Now by 11. Geo. 2. c. 19. s. 14. To obviate difficulties which may occur where devises are not by deed, it is enacted, that the landlord may recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied in an action on the case for use

"and occupation of what was so held or enjoyed; and if on the evidence any parol demise or agreement, not by deed, whereon a certain rent was reserved, shall appear, it shall be made use of as evidence of the quantum of damages to be recovered."

Done

## CASE 3.

## Done against Smethier and Leigh.

Trinity Term, 8. Car. 1. Roll 1310.

In covenant to levy a fine, if the sheriff be a party, the writ shall be directed to the coroners.

Jones, 352. 373.

1 Roll. Ab. 797.

Co. Lit. 158.

8. Mod. 248.

Moor, 547.

2. Vent. 216.

4. Bac. Ab. 450.

Cruise, 19.

**E**RROR to reverse a fine (a) in *Chester*, 2. Car. 1. betwixt *Smethier* and *Leigh* demandants, and *Sir Richard Done* and *Sir John Done* and *Margaret* his wife and *John Done* their son and heir apparent deforceants, &c.

The error assigned was, Because the writ of covenant was directed to the coroners, with this clause in the end of the writ, "*Quia praedictus JOH. DONE miles est vicecomes comitatus CESTRIÆ, fiat ex-ecutio brevis praedicti per coronator' ita quod vicecomes non se intro-mittat,*" where the writ ought to have been directed to the sheriff, &c.

This error was divers times argued at the bar, and much insisted upon by *CALTHROP*, *MAYNARD*, and others, who argued at the bar for the plaintiff in the writ of error. And FIRST they said, That if the sheriff had been the sole party to the fine, yet the writ ought to have been directed to him, because it is but a summons, and the sheriff may summon himself: also it is not returned that he is sheriff and cannot summon himself; and the course of law is, that the writ shall be directed to the sheriff, and not to any other, when it may be done without prejudice; and that the writ is abateable where it is directed to the coroners, &c. *Vide* 18. Hen. 8. pl. 3. 9. Hen. 6. pl. 12.

1. Roll. 797.

Pl. Com. 76. a.

The SECOND REASON, Because that the sheriff is not the sole party, but others are joined with him, &c.

And ALL THE COURT resolved, that it was not error, for if the writ be directed to the sheriff, and he is party, it is doubted in the Books if the sheriff as plaintiff may execute a writ for himself, and as defendant may execute a writ upon himself; and therefore it were good, to avoid that doubt, to take a writ directed to the coroners, as well where the sheriff is plaintiff as defendant, upon surmise thereof in chancery, at the time of suing the writ. And it is the general course to award the writ to the coroners, to avoid the doubt of delay; for if he be plaintiff and makes not such surmise, the defendant peradventure will take exceptions in abatement of the writ; and so if he be defendant he may peradventure plead in abatement of the writ, and cause him to have a new writ. But when it is awarded to the coroners, if the defendant would have excepted against it (as peradventure he might in some cases), yet when he appears and accepts thereof, and comes and levies a fine thereupon, he never afterwards shall assign for error, that the writ ought not to have been directed to the coroners; especially upon this amicable writ to make assurance, &c. *Vide* 34. Hen. 6. pl. 29. 12. Hen. 4. pl. 24. 8. Hen. 6. pl. 28. 2. Hen. 6. pl. 12. *Fitzh. N. Br.* 98. 11. *Edw.* 4. pl. 7. 3. Hen. 6. pl. 2.

In a fine, the certificate of the writ may be amended by the return.

ANOTHER ERROR was assigned, That the writ of covenant in the certificate is, *si fecerit eos secur.* &c. where it ought to be *vos*; but upon view of the return of that writ certified from *Chester*, it was *vos*. —Whereupon it was awarded that the roll should be amended; and the fine was affirmed.

(a) By 10. & 11. Will 3. c. 14. writs of error for reversing fines must be brought within twenty years after levying them, except as to those under the impediments therein mentioned, who are allowed five years after the impediment

removed. By 4. Ann. c. 16. s. 12. the action must be commenced within a year after claim or entry made; and it must be an actual entry. 3. Burr. 1897.

## Downs against Hathwait.

CASE 4.

**D**EBT upon a bond *de quinquaginta duabus libris*. The defendant pleads "*non est factum*." The jury find the bond to be *quinquaginta duabus libris*, with a condition to pay twenty-six pounds, and that the defendant delivered that as his deed to the plaintiff: and if that be the deed of the defendant, as is mentioned in the declaration, they pray the discretion, &c.—And upon motion, THE COURT held it to be found for the plaintiff; for "*quinquaginta*" is all one with "*quinginta*," as "*wiginta*" PRO "*viginta*." Whereupon rule was given, that judgment should be entered for the plaintiff, unless, &c.

A variance between a bond and the declaration of "*quin-*" instead of "*quinginta*" is immaterial.

10. Co. 133. 2. Roll. Ab. 146. Cro. Jac. 147. 208 261 290. Salk. 462.

Afterward, being moved again, another exception taken, That the bond and the declaration were *John Hathwait*, and the roll is *Joaes*.—*Sed non allocatur*; but adjudged for the plaintiff.

A variance of *Joaes* instead of *John* is immaterial.

Cro. Jac. 203. Cowp. 229. (a) It was moved again, and adjudged for the plaintiff. Post. 418.

## Needler against Symnell and his Wife.

CASE 5.

Trinity Term, 11. Car. 1. Roll.

**A**CTION ON THE CASE FOR WORDS. Whereas the plaintiff was of good name and fame, and a citizen and free-man of London, and for twenty years had used, and yet useth, the trade of felling of CRUELL without any deceit, that the defendant's wife said these words, "Thou art a cheater, and hast cheated my husband of five hundred pounds." The defendant pleaded *quod ipsi non sunt inde culpabiles*; and found for the plaintiff, and damages forty pounds.

"*Quod ipsi non sunt cul.*" is a good issue by husband and wife, for the offense of the wife only.

And it was now moved in arrest of judgment, FIRST, That the issue was not well joined; for being for words of the wife, the issue ought to have been *ipsa non est inde culpabilis*.—*Sed non allocatur*: for the husband and wife are charged as for the wrong of the wife; so the issue, *quod ipsi non sunt inde culpabiles*, is well enough.

S. C. Jones, 366. 1. Roll. Ab. 62. 68.

SECONDLY, It was moved, that for these words an action lies not; for the words do not touch him in his profession as a tradesman, nor are applied to him for cheating him in his trade; but it may be that he cozened or cheated him at dice, or by sale of land: and to say that one cozened or cheated him, an action lies not, no more for a tradesman than for any other person; and it hath been so resolved and adjudged in *Sir William Bruncker's Case* (a), and *Gorge's Case* (b).—ALL THE COURT was of that opinion, they delivering their opinions *seriatim*. Wherefore rule was given to enter judgment for the defendant, unless, &c.

Cro. Jac. 5. Cro. Eliz. 883. Hob. 126. 1. Brownl. 6. Palm. 68. 2. Saund. 307. Cro. Jac. 239. 282. Post. 494. 516. 1. Roll. 62. 1 Ro. Rep. 216.

(a) Cro. Jac. 427. (b) Cro. Eliz. 95. Moor, 261. Hutton, 14.

## Doctor Sybthorp's Case.

CASE 6.

**A**CTION FOR WORDS. For that the defendant, at *Burton-Lazers church*, spake these words: "See, *Doctor Sybthorp* is robbing the church:" and afterwards, at another day, spake of the plaintiff, "*Doctor Sybthorp* hath robbed the church" (*innuendo* the church of *Burton-Lazers*).

Maliciously to say that another "*robbing*" such a thing, which if done would be felony, is actionable; for it

shall be intended in the worst sense. S. C. on 1. Roll. Ab. 76.

After



SYTHORP'S  
CASE.

After verdict for the plaintiff, BAGSHAW moved in arrest of judgment, that for the first words an action lies not, because he doth not charge him with an act done, but in attempting to do an act: and for the last words, that it lies not, because it doth not mention what church, nor of what thing; and it may be in taking away the lead, or such things, which are not felony (a), or, as the common speech is, for not paying his tithes.

Cro. Jac. 154.

*Sed non allocatur*: for all the Court held, that for both speeches an action lies; for it is to be intended in the worser part, being spoken maliciously to slander him, and that it was for the taking of such things as is a felonious act. And although it was objected, that robbing the church is an intention to do an act, and is not felony; and to say, that he attempted to do an act cannot be felony, and therefore no cause of action; BERKLEY said, that for saying such a person is robbing such a man, or ravishing such a woman, an action lies: so here. Wherefore it was adjudged for the plaintiff. *Vide Benson v. Morley* (b); where it was adjudged, that for these words, "Thou hast robbed the church," innuendo the church of *Alphage*, an action lies.

(a) Made felony by 4. Geo. 2. 32.

(b) Cro. Jac. 153.

## CASE 7.

## The Case of Downs and Hathwait.

*Vide ante*, page 416.

A bond shall not be avoided by vitious writing or incongruity. *Ante*, 33. 314. 386. S. C. Jones, 366. 2. Roll. Ab. 136. Cro. Eliz. 896. Cro. Jac. 147. Hob. 19. 4. Com. Dig. 279. 1. Term Rep. 240.

**T**HIS Case was moved again. ROLLE, for the plaintiff. FIRST, There is a variance betwixt the obligation and the declaration; for the declaration is, that JOHANNES HATHWAIT *fuit oblige*; and the obligation is JOAEM, without any dash or prick over it; so it cannot be the same obligation whereof he declares, and the bond is void for the insensibility; for *Joaem* is not any name.—*Sed non allocatur*; for it is the same word, and shall be intended *Johannem* abbreviated: and an obligation shall not be avoided by vitious writing or incongruity.

SECONDLY, He moved, that *quinginta* is not a word of any certainty, and especially it cannot be taken for *quinguaginta*, for it wants the syllable "*qua*;" and if it hath any sense, it is rather to be taken for five hundred than for fifty.—*Sed non allocatur*: for it cannot be taken for five hundred, because it is not "*genta*," which is taken for a hundred; and it hath sufficient intendment to be fifty, by the condition to pay six-and-twenty pounds. And a case was remembered, that an obligation "*septingent*" was taken for "*septuagint*," and not seven hundred, nor void: so here. Wherefore it was adjudged for the plaintiff.

## CASE 8.

## Baker and Unica his Wife against Brereman.

*Easter Term, 11. Car. 1. Roll 152.*

In an action for stopping a way, the plaintiff must prescribe to him who has the inheritance; for an allegation that all occupiers of a certain close ought to have a way for them and their servants, &c. is not sufficient; but inhabitants may prescribe for an easement, &c. in the soil of another. *Ante*, 346.

**A**CTION ON THE CASE. Whereas the wife, before marriage, was possessed of a lease for years of a close in *St. Martin's*, in which close a stable was formerly erected, and now an house there built; and that the defendant was occupier of another close called THE YARD, in the said parish of *St. Martin's*, near adjoining to the plaintiff's close; and that within the said parish there is, and time whereof, &c. was, a custom, that all the occupiers of such close ought to have a way for them and their servants, &c. is not sufficient; but inhabitants may prescribe for an easement, &c. in the soil of another. *Ante*, 346.

a close

a close of the plaintiff's, from time whereof the memory of man is not to the contrary, *habuerunt et habere consueverunt*, for them and their servants, *quandam viam tam pedestrem quam equestrem* at all times of the year for all carts and carriages from the said close of the plaintiff's in vel ultra the close called THE YARD, *ad vel in* a place usually called THE LEYSTALL in St. Martin's aforesaid; *et sic retrorsum* from the said place called THE LEYSTALL, *et in ultra* the said close called THE YARD, *usque ad* the close of the plaintiff. And the said *Unica* his wife so being possessed, and having the occupation of the said close, that the defendant, to hinder her of her way, and totally to exclude her, such a day and year erected a building upon the close called THE YARD, *ex transverso viæ prædictæ*, that she might not have nor use the said way; and that afterward she married the plaintiff *Baker*, and that they, after the marriage, could not use the said way, to their damage of forty pounds.

The defendant pleads not guilty; and found against him. HUTCHINGS now moved in arrest of judgment, FIRST, That such a custom within a parish alledged for an occupier of such a close to have a way, &c. is not good, but he ought to prescribe in him who hath the inheritance; and that a custom in a parish cannot be well applied to a close in the parish.—And ALL THE COURT was of that opinion.—21. Eliz. Dyer. 363. 6. Co. 60. b.

ROLLE alledged, that he cannot otherwise prescribe, because one man was once owner of the inheritance of both closes; and unity may not destroy the way; but that it is revived by the disleverance, as 21. Edw. 3. pl. 2.

IT WAS ANSWERED thereto, that it ought to have been so specially shewn, which doth not appear here; and peradventure it will not serve in case of a way: but in case of necessity, as a water-course betwixt two houses, or peradventure inclosure, or such things which are of necessity, there he may so prescribe, and the party ought to except them in his conveyance. Vide 11. Hen. 7. pl. 25.

And ALL THE JUSTICES held, that inhabitants may alledge prescription for a way to church or market, which are of necessity, and in matter of discharge, as in *modo decimandi*, or to be quit of toll; but not in matter of profit or charge in another soil, as *Gateway's Case* (a), 8. Edw. 4. pl. 4. for fishermen to dry their nets for the public benefit or for easement, as 15. Edw. 4. pl. 29. & 18. Edw. 4. pl. 3. (b).

Show 257. 1. Lev. 176. 2. Lev. 253. 3. Lev. 386. Hob. 86. 118. Co. Lit. 110. b

THE SECOND EXCEPTION was, Because the wife joined with the husband in the action for the stopping during the coverture, which ought not to be.—*Sed non allocatur*; because the wrong was done to the wife, and the husband had it in right of his wife.

But for the first exception it was adjudged for the defendant.

Post. 348 —Cro. Eliz. 96. 459. 608. 613. 1. Com Dig. 571. 575. See S. C. cited, 2. Mod. 217. Bull. 110. *Sed vide* Ld. Ray 443. 1. Stra. 61. 229. 2. Stra. 716. 977. 12. Mod. 294. Dougl. 329. 3. Term Rep. 627.

(a) 6. Co. 61.

Hutchman

BAKER  
against  
BREKEMAN.

Jones, 267. 367.  
4. Lev. 386  
Co. Lit. 113. b.  
4. Co. 31.  
Cro Jac. 152.  
446. 665.  
2. Leon. 44.  
6. Co. 61.  
5. Co. 99.  
Godb. 54.  
Fort. 340.  
3. Burr. 1402.  
4. Com. Dig.  
471.  
3. Term Rep.  
147.

(a) Cro. Jac  
152.  
Cro. Eliz. 180.  
2. Roll. Ab. 264.  
Carth. 191.

In an action for  
stopping a way  
to the wife's  
close previous  
to the marriage,  
the husband  
ought to join.  
2. Mod. 217.  
Dougl. 329.

## CASE 9.

## Hutchman against Porter.

In an action for a malicious prosecution "*acquietatus*" is sufficient, without saying "*inde*."

*Vide ante*, 286.

315.

Cro. Jac. 131.

230.

Yelv. 161.

1. Com. Dig. 161.

See 1. Hawk. P. C. ch. 72. s. 2.

**T**HIS case was now moved again, and THE COURT agreed that the judgment was good; for it cannot be intended, that he was acquitted of any other matter; therefore he was acquitted *inde*, and it is certain enough. The writ in *Fitzherbert* (a) of conspiracy is *acquietatus*, and he doth not say *inde*; and the precedents are both ways. The two precedents in the *Old Entries*, 123. is *acquietatus*, omitting *inde*; and although the other precedents, which are *acquietatus inde*, are the surest way, that doth not prove but where *inde* is omitted it is good enough. Whereupon all THE FOUR JUSTICES resolved, that the judgment was good, and affirmed it accordingly.

(a) *Natura Brevium*, p. 115.

## CASE 10.

## Spencer against Medburne and his Wife.

In an action for these words, "Tell my landlord he is a thief," it must be averred that the plaintiff is the landlord spoken of.

*Ante*, 177.

*Post*, 492.

2. Roll. Ab. 84.

**A**CTION FOR WORDS. Whereas the defendant's wife, having communication with J. S. of the plaintiff, and intending to deprive him of his good name and fame, and draw him into peril of his life, such a day and year spake of the plaintiff *hæc Anglicana verba*: "Go tell my landlord" (*innuendo* the plaintiff) "he is a thief, and I will cause him" (*innuendo* the plaintiff) "to be hanged;" the defendants pleaded not guilty; and it was found against them.

And now FARRER, for the defendants, moved in arrest of judgment, Because it is not alledged nor averred, that the plaintiff was her landlord, and the *innuendo* will not help it.

BUT TAYLOR, for the plaintiff, argued, Forasmuch as it is laid, that communication was by the defendant's wife of the plaintiff, and upon communication it is alledged, that the wife said *de eodem quærente* the said words, "Go tell my landlord" (*innuendo* the plaintiff), it is a certain description that they were spoken of the plaintiff; and when the jury hath found them guilty, it proves that the words were spoken of the plaintiff, who was her landlord, otherwise it could not be found to be spoken of him.

And JUSTICE JONES and MYSELF were of this opinion; but BERKLEY, and BRAMPSTON, Chief Justice, doubted thereof; for if the declaration in itself is not certain by an *innuendo* to be spoken of the plaintiff, the verdict can never aid it: and it is not here shown that the plaintiff was her landlord, and she might have more landlords, and *non constat* of whom she spake. Wherefore *Curia advisare vult*.—And after it was advised, to avoid further question, that the plaintiff should relinquish this action, and amend this fault in the second. And it was ordered by consent.

(N) *Sed vide*

2. Roll. Ab. 84.

where it is said, that in *Hilary Term*, 11. Car. 1. judgment was given in this case against the plaintiff, *quod nil capiat per billam*.

## CASE 11.

## Price against Packhurst and Others.

*Hilary Term*, 10. Car. 1. Roll 716.

In debt on bond by six executors, three of whom

**E**RROR of a judgment in the common pleas. Whereas an action of debt was brought by six executors named in the writ, on verdict for the plaintiffs, the three who prosecuted may sign judgment without naming the others.—2. Roll. Ab. 98. Dyer, 319. Went. Off. Ex. 104.

and



and after three of them being summoned and severed, the three others bring debt upon an obligation made to the testator. The defendant pleaded, *non est factum*; and found against him, and judgment for the plaintiff.

PRICE  
against  
PACKHURST  
and OTHERS.

GERMYN now assigned for error, That there is not any mention therein of those which severed, for they, being always executors, ought to be named in the judgment. And it was commanded, that they should search the precedents in the common pleas, to see what the course was there, Whether, upon summons and severance, judgment only shall be for those which prosecuted? And it was certified by the three prothonotaries, that the course was so.

And THE COURT, *absente* BRAMPSTON, were of opinion, that it is a good course, and no cause of error: for the executors who are severed peradventure never proved the testament, and it may be never will prove it or administer; therefore when they are named in the writ, and will not join, it is reason judgment shall be only for those who prosecuted, without naming those who are severed. Whereupon rule was given, that judgment should be affirmed unless, &c.

### Smith against Smith.

CASE 12.

ERROR of a judgment in the common pleas. The error assigned was, Because the *venire facias* was returned by Sir Richard Saltingston, sheriff of Essex, in *Craftino Martini, nono Caroli*; and that then in *Craftino Martini, nono Caroli*, the said Sir Richard Saltingston was not sheriff, but one Henry Smith. The defendant in the writ of error saith, that Sir Richard Saltingston was made sheriff of Essex before the return of the said writ, viz. *decimo Novembris, nono Caroli* by the king's patent dated *decimo Novembris, prout patet de recordo*. Upon "*nul tiel record*" pleaded at the day, he procured in court the letters patents whereby he was made sheriff. And it was moved by MAYNARD, that this ought to be tried *per pais*, whether he were sheriff at such a day, and not by the record of the patent; for he might be discharged before the day.—*Sed non allocatur*; for it shall not be intended, unless it were by pleading shewn to the Court.—Wherefore the judgment was affirmed.

Of an error in fact, as that A. on the return of the *venire* was not sheriff, in *nullo est erratum* is no confession of it.  
Ante, 245.  
2. Roll. Ab. 575.  
758.  
9. Co. 31.  
Cro. Jac. 12.  
29. 521.  
Raym. 231.  
3. Bac. Ab. 275.

### Horn against Barbar.

CASE 13.

DEBT upon an obligation. The defendant demands *oyer* of the condition, which was, That if he paid the rent reserved upon the lease of a mill and certain lands during the term of thirteen years, the defendant cannot plead payment generally, but must specially shew which of them he has performed.  
Ante, 76.  
Co. Lit. 303.  
Cro. Eliz. 232.

Ab. 460. Cro. Jac. 460. 1. Lutw. 581. Palm. 70. Savil. 120. 1. Leon. 311.  
Cro. 303. Salk. 498. Cowper, 578. Dougl. 685.

CRO. CAR.

E e

ments

HORN  
against  
BARBER.

ments contained in the indenture *secundum formam et effectum indenturæ et conditionis prædictæ*. And upon this plea the plaintiff demurred.

And KEELING, for the plaintiff, shewed for cause, For that the condition is in the disjunctive, viz. "at the four Feasts, or within ten days after every Feast, or within six months" (according to the agreement), and therefore he cannot plead payment generally; for he hath election to pay it at which of those days he will.

I was of opinion, that the defendant might plead payment generally; but JONES and BERKLEY against it, Because the obligation refers to one of the three times, viz. "the four Feasts, or within ten days after every of them, or within six months," where he hath election upon which of those days he will pay: and he pleaded that he hath performed the covenants, payments, and agreements, it is no plea to this condition. Wherefore they gave rule, *absente BRAMPSTON*, that judgment should be given for the plaintiff, unless, &c.: and afterwards judgment was entered accordingly. *Vide 21. Edw. 4. pl. 12. et 44. Keilway, 95. 38. Hen. 6. pl. 26. 8. Co. 133. b. C. Lit. 303. b. 5. Hen. 7. pl. 9. 22. Edw. 4. pl. 44.*

## CASE 14.

## Sydowne against Holme.

In prohibition to a suit for tithes of abbey land, if it appear that the abbot was exempted from the payment of them at the time of the dissolution, it shall be intended an exemption by reason of personal privileges, and not on account of any composition real.

**P**ROHIBITION; surmising, That the Prior of Bristol was seised in fee of such land parcel of his priory, and that he and all his predecessors time whereof, &c. until the dissolution, held the said lands, being parcel of the demesnes of the said priory, discharged and acquitted from the payment of tithes, for his fermors and tenants for life or years of the said lands, &c.; and that the said priory was dissolved by the 27. Hen. 8. c. 28; and that the said king was seised in fee of the said lands, &c.; and shews the statute of 32. Hen. 8. c. 13. "That none shall be sued for tithes who were discharged by the laws and statutes of the realm," and the statute of 2. Edw. 6. c. 13. and that king Henry the eighth died seised of the said lands, and so conveys it by mean conveyance to Edward Bartell, and to the plaintiff, as his tenant for years: and that the parson of Bristol sues him for tithes.

S. C. Jones, 368.  
S. C. 1. Roll. Ab.  
654.

2. Co. 47. 49.  
11. Co. 10. 14.  
2. Inst. 653.  
Hob. 298. 306.  
Cro. Eliz. 206.  
Cro. Jac. 452.  
Hard. 315.  
3. Com. Dig.  
86.  
5. Bac. Abr. 86.  
3. Will. 573.

Upon that prohibition the defendant demurred in law; and after arguments at the bar, it was argued at the bench.

THE FIRST QUESTION was upon this discharge being shewn to be time whereof, &c. in a spiritual person, viz. the prior, Whether this privilege thereof be determined by the dissolution of the priory or still remains, and may be in the king and his patentee, without the aid of the 27. Hen. 8. c. 28. and 31. Hen. 8. c. 13.?

And I argued, that in regard it was discharged time whereof, &c. in a spiritual person, viz. the prior and convent, who were capable to have or to be discharged of tithes, it being a privilege vested in them before the Council of Lateran (which was before any parochial right), it may by intendment be by composition real; and then shall go with the land, as 8. Edw. 4. pl. 11. and F. N. B. 41. g.

any lay-person may have a composition, and thereupon may have a prohibition, much more a spiritual person may have it, by this means, &c. and it shall go with the land. *Vide 7. Edw. 3. pl. 3. 10. Hen. 7. pl. 18.* that a spiritual person may make such a prescription; and then being a prescription, fixed in a spiritual person by the dissolution, it comes to the king, being *persona mixta*, and from him to his patentee, as *Bp. Winchester's Case (a)*, and *Priddle v. Napper (b)*.

SYDOWNE  
against  
HOLME.

But BRAMPSTON, JONES, and BERKLEY argued to the contrary; yet they agreed, that it shall be intended that such discharge was by composition real, and shall go with the land, as the case put of a common person, which is, that a lay-person shall have advantage of a real composition, if he can shew it: but because a spiritual person may have divers causes of privileges, by grant as well as by composition, and that in divers manners, it shall be intended the most general course; which is a personal discharge, which determines with their corporation, as in *3. Edw. 3. pl. 11.* And in favour of the church it shall be intended, that it was rather by grant of privilege than by any real composition, and that the tithes are due to the parson, and shall not be taken from him, unless that the discharge continue; which is not here shewn.

Hob. 42.

THE SECOND MAIN QUESTION was, admitting that this discharge is by privilege granted to the priory, which being one of the inferior abbeyes, came to the king by the *27. Hen. 8. c. 28.* being out of the value of 200l. *per annum*, Whether this privilege be not merely determined; or, whether it is not revived by the *27. Hen. 8. c. 28.* and *31. Hen. 8. c. 13.*?

Lands appurtenant to religious houses, or to abbeyes, given to the king on the dissolution of the lesser abbeyes under 200l a-year, by the *27. Hen. 8. c. 28.* are not exempted from the payment of tithes; for the privilege is not revived by the *31. Hen. 8. c. 13.*

And in this point I argued, that it is aided by the *27. Hen. 8. c. 28.* because that gives the possession of the abbeyes to the king, in as ample and large manner as the abbot had them at the time of the dissolution; and it was discharged at the time of the dissolution: and if it be not aided by the *27. Hen. 8. c. 28.* yet it is to be aided by the *31. Hen. 8. c. 13.* by the general clause; which is, that the king and his patentees of any monasteries, &c. shall have and enjoy the same, discharged of the payment of tithes, &c. as the late abbot, &c. had, held, and enjoyed, &c.

Jones, 3. 185.  
370.  
Cro. Jac. 608.  
2. Co. 46.  
Moor, 913.  
Bunb. 122.

And whereas it hath been objected, that this statute extends only to abbeyes which came to the king after the fourth of February, *27. Hen. 8. c. 28.* but this abbey came to the king the fourth of February, *27. Hen. 8. c. 28.* and so excluded out of this statute; I answered thereto, That this statute extends to abbeyes surrendered, relinquished, renounced, or given up to the king after the fourth of February, *27. Hen. 8. c. 28.*; and that is intended to extend to all abbeyes which are given by the *27. Hen. 8. c. 28.*: for although it hath not relation to the fourth of February, *27. Hen. 8. c. 28.* yet that is but a foreign surmise by such relations to prejudice the king; as it is *3. Co. 29. a.* relations are but fictions, which shall not prejudice the king by such constructions: and in *rei veritate* all the said abbeyes were surrendered or relinquished after the fourth of February, *27. Hen. 8. c. 28.* or during that parliament: and the exposition hath always been, that this clause extends as well to abbeyes

(a) 2. Co. 44, 45.

(b) 11. Co. 12.



SYDOWNE  
against  
HOLME.

which came after the statute of 27. Hen. c. 28. as to the superior abbeys; and never any question made in these times, or in sixty years after the making of the said statute; and therefore the cases of — *v. Hayant (a)*, *Cogall v. Fairfax (b)*, and *Smith v. Patenson (c)*, were cited, where prohibitions were granted upon surmise, that the lands came to the king by the 27. Hen. 8. c. 28. and that in *Berly v. Walter (d)*, a prohibition upon the surmise for this land was granted; where it being in question, Whether where continual usage had been, that as well for inferior abbeys given to the king by the 27. Hen. 8. c. 28. as to abbeys which came after, and held their lands discharged, such prohibitions should be granted? I HELD it to be an equal mischief, as well for the one as for the other, and that the statute extends equal remedy; and so the exposition hath been always taken by the practice.

Cro. Jac. 608.  
2. Co. 49.

But BRAMPSTON, *Chief Justice*, JONES, and BERKLEY argued to the contrary, that the 27. Hen. 8. c. 28. doth not preserve or revive this privilege, because there are not any words that it shall be discharged as the abbot held it, but that the king shall have it, in as ample manner and form as the abbots held it; and general words will never preserve the privilege and immunities which were determined, unless by special statute they be revived: and the statute of 31. Hen. 8. c. 13. doth not extend to them; for all the scope of the said statute is only to extend to abbeys which came to the king after the fourth of February, 27. Hen. 8.: and all abbeys which came to the king by the statute of 27. Hen. 8. c. 28. came to him the fourth of February, 27. Hen. 8.; and to those the statute of 31. Hen. 8. c. 13. doth not intend to extend; for in every branch are mentioned only the abbeys, &c. which came to the king after 27. Hen. 8. And although this clause to be discharged of tithes, in the body of the said clause, is "any monasteries, &c." yet it is after the "said late abbots, &c.;" and abbots are not mentioned before in that clause; and therefore it ought to be expounded and coupled with the clauses before, which mention and intend only what came to the king after the fourth of February, 27. Hen. 8. and doth not extend to abbeys which came to the king the fourth of February, 27. Hen. 8.

Hob. 111.  
4. Inst. 25.

And JONES said, Although it is no statute until the end of the sessions when the king assents, yet when there hath been a session, it shall have such relation to the first day of the sessions, that they vest actually in the king the said fourth day of February, 27. Hen. 8. that the king shall have the rents incurred after the first day, and before the last day; and if they be paid in the interim to the abbot, they shall be paid again to the king.

Hob. 309. 10.

JONES and BRAMPSTON relied upon the judgment in *Gerrard v. Wright (e)*, where it was held, upon solemn argument, by HOBART, WINCH, and HUTTON, *Justices*, that the 31. Hen. 8. c. 13. doth not extend to abbeys which came to the king by the 27. Hen. 8. c. 28.; and the case of *Whitton v. Weston (f)*, for the possessions of the abbey of St. John's of Jerusalem, where the question being

(a) 7 Eliz. Roll. 245. in B. R.

(b) Easter Term, 27. Eliz. Roll. 328. in B. R.

(c) Easter Term, 37. Eliz.

(d) 40. Eliz. Roll 679.

(e) 18. Jac. 1. in C. B. Cro. Jac. 608.

Hob. 306. 1. Jones, 2.

(f) In B. R. 4. Car. 1. Lat. 11. 8.

3. Jones, 182. Bridg. 32. Godb. 39. Bendloe, 168. 185. Winch's Entries, 34.

Whether the said abbey came to the king by the special act of 32. Hen. 8. c. 13. ? all the four Justices agreed, that the case of *Gerrard v. Wright* was good law, that the abbeys which came to the king by the 27. Hen. 8. c. 28. were not within the privilege of 31. Hen. 8. c. 13. nor to have the benefit of that statute.

SYDOWNE  
against  
HOLME.

Hob. 307.  
1. Levintz. 185.

And BERKLEY, *Justice*, insisted much that this privilege to be discharged of tithes, being a mere personal privilege, was determined by the dissolution of the abbeys, and tied only to their bodies and persons, nor can be revived without special words, which are not in the 27. Hen. 8. c. 28. : and that although the 21. Hen. 8. c. 13. extends to the said abbeys suppressed by the 27. Hen. 8. c. 28. yet there is a saving in the said 31. Hen. 8. c. 13. of all rights and interests besides, to the donors, abbots, &c.

Wherefore for the reasons before, but principally for that the abbey dissolved appeared to be suppressed by the statute of 27. Hen. 8. c. 28. by the opinion of the said three Justices it was adjudged for the defendant ; and *consultation* awarded.

### Smith against Smith.

CASE 15.

Michaelmas Term, 10. Car. 1. Roll 142.

**E**RROR of a judgment in FORMEDON *in remainder* in the common pleas ; where the judgment being for the demandant, and the judgment in this court affirmed ;

WHITFIELD, *Serjeant*, moved to have costs assessed to the defendant in the writ of error, because the writ was brought before execution, and thereby the execution delayed according to the statute of 3. Hen. 7. c. 10.

But IT WAS RESOLVED, that soasmuch as there were no costs nor damages recovered or allowed in the first action, so that no execution is delayed, but only for the land, no costs are allowable by that statute. Whereupon it was ruled accordingly.

No costs can be allowed by 3. Hen. 7. c. 10. on judgment for the demandant in FORMEDON affirmed on error by the tenant Ante, 421. R. 93 704 Vent. 88. Lev. 146. Ray. 134. And. 113. Strange, 1084. Term Rep. 78.

Cro. Eliz. 617. 659. 2. Com. Dig. 555. Dougl 560. 709. 751. 2. Term Rep. 78.

### William Byrte against Manning.

CASE 16.

**D**EBT upon an obligation, conditioned for performance of covenants. The defendant demands *oyer* of the condition, and pleads performance. The covenants were, that *Thomas Byrte*, son of *William Byrte*, should espouse *Anne* daughter of the said *Manning* : and in consideration of this marriage, *Manning* covenanted to pay 300l. ; and *William Byrte* covenanted to assure such lands to the said *Thomas* and *Anne* for her jointure. And there were other covenants for the value thereof and quiet enjoyment : and amongst others, *Manning* covenanted, that " he will procure the said *Thomas Byrte* to be presented, admitted, instituted, and inducted into such a benefice upon the next avoidance of the said church." The breach assigned was, for not performance of the said covenant of procuring him to be admitted, instituted, &c.

A covenant to procure another to be presented, &c. to a benefice upon the next avoidance, in consideration of marriage, is simoniacal and void. Cro. Eliz. 788. Cro. Jac 533. 2. Bl Rep 1053 4. Term Rep. 78. 359.

And

BYRTE  
against  
MANNING.  
Ante, 361.  
1. Lutw. 346.

And upon this breach assigned the defendant demurred, Because this covenant is against law, being a simoniacal agreement; and a bond for performance thereof is not good.

But ALL THE COURT held, that if it had appeared to have been, that in consideration of the marriage of his son, &c. he would procure him to be "presented, admitted, instituted, and inducted into" such a church," that had been a simoniacal contract, and had avoided the obligation. But here this covenant is not in consideration of the said former covenants, nor depending upon them, but it is a mere distinct covenant by itself, and independent upon the former: and without special averment or shewing that it was a simoniacal contract, it shall not be so intended; but it may be a covenant upon good consideration. Wherefore it was adjudged for the plaintiff.

Vide 12 Ann. c. 12.

#### CASE 17.

#### Piffin against Fenton.

After issue joined in an action against two defendants, if one of them die the writ will not abate.

1. Roll Ab. 756  
767.

S. C. Jones, 367.

Hard. 151. 164.

Style, 269.

3. Mod. 249.

Shower, 186.

Salk. 8.

Ld. Ray. 1415.

3. Bac. Ab. 275.

**E**RROR of a judgment in the common pleas. The error assigned was, Because the action was brought against two, and issue joined by two defendants; and after issue joined, one of the defendants died, notwithstanding there was a *venire facias* awarded to try the issue betwixt the plaintiff and the said two defendants; and the *venire facias* and *habeas corpora* and the issue found mentions, that it was betwixt the plaintiff and two defendants.

And although it be surmised that he died before judgment, so no judgment is to be given against him, yet he ought to have surmised it before the issue tried; and therefore HENDEN, *Serjeant*, very much urged it to be an error.

But it was resolved by ALL THE COURT, that such surmise needs not to be in *judicial process* to alter it; and therefore, although a *venire facias* issued against a dead person, yet one of the defendants being alive is sufficient, and no cause of error. Whereupon the judgment was affirmed. Vide 3. Hen. 7. and 4. Hen. 7. pl. 7. for this point.

Sec 17. Car. 2. c. 8. and 8. & 9. Will. 3. c. 7. f. 6.

#### CASE 18.

#### Digbie against White.

Variance in pleading a release.  
Post. 518 574.  
Dyer, 307.  
Co. Lit. 292.  
Cowp. 178.

**D**EBT upon an obligation of twenty pounds, dated 24th June, 9. Car. 1. The defendant pleaded, that the plaintiff 22d February, *decimo Caroli*, released to him all actions and demands which he had, &c. The plaintiff demands *oyer* of the release, which was a release of all actions to the 14th of January, before the date of the release; so it is not a release of all actions until the day of the release.— And for this misprision the plea WAS ADJUDGED ill; and the plaintiff had judgment.

Stone



## Stone against Newman.

CASE 19.

Easter Term, 7. Car. 1. Roll 115.—In the Exchequer Chamber.

**REPLEVIN.** UPON DEMURRER in the king's bench the case was, *Sir Thomas Wyat* was tenant in tail to him and his heirs males of his body, of the gift of KING HENRY THE EIGHTH, reversion to the king in fee; and he being so seised, he infeoffed there-of *George Moulton* and his heirs the 35. Hen. 8. to the use of him and his heirs. *Sir Thomas* had issue *George Wyat*, who had issue *Sir Francis Wyat*, in whose right the defendant distrained for damage feasant, and made conusance.

The plaintiff shews, that the said *Sir Thomas Wyat*, who made this feoffment, in 1. Mary was attainted of treason and executed. And this attainder was the same year confirmed by special act of parliament; and by special words, that he should lose and forfeit all his lands and tenements; and that they should be vested in the queen and her successors without office.

Upon all this matter disclosed in pleading, the question was, Whether after this feoffment *Sir Thomas Wyat* had an estate or right remaining in him, which is not forfeited and given to the queen by this attainder and act of parliament? for if it be forfeited, the plaintiff who claims under the queen's patent is in, and hath good title, and judgment ought to be given for him; but otherwise, judgment ought to be given for the defendant, who claims under *Sir Francis Wyat*, the issue in tail.

And after divers arguments in the king's bench at the bar, although there was not any variety of opinions of the Justices of the king's bench discovered, yet because it was a case so long controverted, and the same case in substance which was reported by Mr. PLOWDEN in *Walsingham's Case* adjudged in the exchequer, and afterward in the common pleas to the contrary in *Austin's Case*, the Court adjourned it into the exchequer chamber to be argued before the Justices and Barons of the exchequer.

And after divers arguments at the bar, it was argued solemnly in the exchequer chamber by all the Justices and Barons of the exchequer, except RICHARDSON, *Chief Justice*, who died whilst the argument was depending, and BRAMPSTON made *Chief Justice*: and it was argued by RICHARD WESTON, *Puisne Baron* of the exchequer, and by SIR FRANCIS CRAWLEY, *Puisne Justice* of the common pleas, the first day, for the plaintiff; and upon the second day by SIR ROBERT BERKLEY, *Puisne Justice* of the king's bench, and SIR GEORGE VERNON, *Justice* of the common pleas, for the plaintiff; and afterwards upon a third day by SIR THOMAS TREVOR, *Baron* of the exchequer, for the plaintiff, and by MYSELF, for the defendant; and after, upon a fourth day, by JONES and HUTTON, *Justices*, for the defendant; and after, upon another day, by BARON DENHAM, for the plaintiff; and at another day, by SIR HUMPHRY DAVENPORT, for the plaintiff; and after, upon another day in this Term, by SIR JOHN FINCH, *Chief Justice* of the common pleas, for the defendant (but I being sick at the time of his argument did not hear it). BRAMPSTON, *Chief Justice*, did not argue, because he was made *Chief Justice* after the argument begun.

If tenant in tail of the gift of the crown make a feoffment in fee, and is afterwards attainted of high-treason, the right of the intail is forfeited; for it cannot be discontinued, because the reversion always remains in the Crown; and though it be put in abeyance by the feoffment, as to any benefit which the feoffor could have claimed from it, yet since it is not turned to a right of action, but (if there had been no attainder) would have continued in him for the time, it shall likewise continue in him for the benefit of the Crown.

Post. 460.

Plowd. 547.

552.

Co. Lit. 221.

335 545.

Hob. 343.

2 Roll. Rep. 305.

1. Hal. 243.

2. Hawk. P. C.

642.

Co. Lit. 373.

note (2).

5. Term Rep.

734.

The

STONE  
against  
NEWMAN.

THE CHIEF BARON, and other Justices and Barons which argued on the plaintiff's part, much insisted on the arguments and reasons given by *Sanders* in *Walsingham's Case* (a).

Co. Lit. 335. a. FIRST, Because it being a feoffment by tenant in tail of the gift of the king (the reversion remaining in the king at the time of the feoffment), there is no discontinuance of the estate tail : for it cannot discontinue the reversion in the king ; and therefore the estate tail remained in him at the time of the attainder ; and the forfeiture thereof vested in the king by the statute of 26. Hen. 8. c. 13.

Hob. 34. NOTE, They all agreed, that if tenant in tail of a common person  
3. Co. 2. make a feoffment, where no reversion is to the king, it is a discontinuance ; and if he be attainted of treason, there is no forfeiture to the  
1. Leon. 270. king, as 3. Co. 2. b. *Marquis of Winchester's Case* is.

Hob. 340. SECONDLY, That if the estate tail be not in him to be forfeited,  
Cro. Eliz. 389. yet the right of the intail remains, which is forfeited and given to the  
2. Hawk. P. C. king by the statute of 33. Hen. 8. c. 20. or by the private act made  
642. in the first year of queen *Mary*, which gives all estates and rights,  
Pl. Com. 561. a. &c. And although that a feoffment gives all estates, interests, and rights, in case where tenant in fee makes a feoffment, yet it is not so in case of a feoffment made by tenant in tail, because the estate tail is an incident inseparable to his person and blood, and cannot be transferred to any other ; which is the reason that one cannot plead a *que estate* of a tenant in tail.

Hob. 337. THIRDLY, Because the privity of estate remains betwixt the do-  
Pl. Com. 161. a. nor and him, and cannot be transferred over ; and much more strong where the reversion is to the king, the privity remains in him for the benefit of the king ; which is the reason that the donor may avow upon him for his rent, and shall not be compelled to alter his avowry, as 48. Edw. 3. pl. 8. 5. Edw. 4. pl. 34. 4. Hen. 4. pl. 32. ; and that if his heir within age recovers in a *formedon*, he shall be in ward : and in case of the king, where tenant in tail, remainder in the king, makes a feoffment, yet his heir within age shall be in ward to the king before entry or recovery, as FITZHERBERT'S *Natura Brevium*, by reason of the privity betwixt the king and his tenant in tail ; which cannot be altered.

Hob. 337. THE FOURTH REASON, which they much insisted upon, was,  
Pl. Com. 551. a. That the right always remained in him, and is forfeitable by the statutes of 33. Hen. 8. c. 20. and 1. Mary, sess. 1. c. 1. : for the writ of *FORMEDON in descender* supposeth *quod descendit jus* ; and the declaration mentions as much, which always ought to comprehend truth ; which proves that the law accounts the right to be in him, and from the father descended to his son ; and then being in him, it is forfeitable by his attainder of treason.

Hob. 34. THE FIFTH REASON, That it is for the greater benefit of the Crown to expound it most strongly against traitors and their issues, for the king's profit and discouragement of traitors, that they should not hope their issue should inherit ; and they much relied upon the judgment in point in *Walsingham's Case* (b) : and they said, although it were questioned by a writ of error, yet it was al-

(a) Plowd. 547.

(b) Plowd. 547.

firmed,

firmed, and the land enjoyed always after the judgment; and upon *Lord Sheffield's Case* (a), which was adjudged upon a writ of error brought in the exchequer chamber, where the judgment was, that the land of tenant in tail after a feoffment was forfeited to the king.

But against that it was argued by HUTTON, *Justice*, Jones, *Justice*, MYSELF, and LORD FINCH, who, as I heard, concurred with our reasons, that the judgment ought to be given for the defendant.

FIRST, That although the reversion is in the king, and there is no discontinuance, yet all is divested out of the feoffor, as strongly as if there had been a discontinuance: and if it had been a feoffment by tenant in tail, the reversion to a common person, after such feoffment and discontinuance, nothing remained, and nothing can be forfeited; as it is agreed in *The Marquis of Winchester's Case* (b), and *Doubtye's Case* (c), that right of entry is only forfeited, and not right of action: and although it hath been much insisted on by the other side, that when there is no discontinuance, no estate passeth but for the life of tenant in tail, so that the reversion of the estate and the right remain in him; and urged it out of the words of *Littleton* (d), that no estate passeth but for the life of tenant in tail; yet it was thereto answered, that clearly an estate in fee passeth to the feoffee, descendible from him to his issue, and whereof the wife of the feoffee shall have dower, and the feoffee shall have, after a recovery by default, a writ of right and a *quod ei deforceat*: and the intent of *Littleton* (e) is, that the feoffee or grantee of the reversion hath no more right to the estate than for the life of the tenant in tail; but the fee in the interim passeth to the feoffee; as in case of exchange (f), and in the case of the grant of a reversion (g), and *Seymour's Case* (h), the *Case of Fines* (i), *The Year-Book* (k), and *Plowden* (l). And if tenant for life, reversion to the king, make a feoffment, it cannot touch the reversion in the king, nor a fee descendible passeth: but where tenant in tail, reversion to the king, makes a feoffment, there a base fee shall pass, determinable by the entry of the issue in tail: but out of an estate for life, where the reversion is not touched, no fee shall pass but only an estate which passeth as an occupancy; as the difference is *Co. Lit.* 339. b. tenant in tail, reversion to the king, is disseised, and a descent cast, it is good, and shall bind the issue; but tenant for life, the reversion to the king, is disseised, no descent can be cast, because a fee cannot be extracted out of an estate for life. And 18. *Edw.* 3. pl. 12. where tenant in tail, reversion to the king, makes a lease for life, he gains a new reversion, and it shall descend to his issue. And JONES cited *Stratfield v. Dover* (m), that a descent upon tenant in tail, reversion to the queen, shall bar the entry of the tenant in tail and his issue.

(a) 21. Jac. 1. Hob. 334. Palm. 351. 13. Hen. 7. pl. 10. 21. Hen. 7. pl. 41.  
2. Roll. Rep. 312.

(b) 3. Co. 2.

(c) 3. Co. 11.

(d) Sect. 650.

(e) Sect. 650.

(f) Year-Books, 9. *Edw.* 4. pl. 22.  
1. Hen. 6. pl. 23.

(g) Year-Books, 24. *Edw.* 3. pl. 28.

(h) 10. Co. 96

(i) 3. Co. 84. b. Co. Lit. 335. a.

(j) 22. Rich. 1. pl. 50.

(k) Plowd. 557.

(m) Cro. Eliz. 595. But see Mr. Butler's note of Lord Nottingham's MSS. upon this case, Co. Lit. 373. a. note (2).

SECONDLY,



STONE  
against  
NEWMAN.

Co. Lit. 54. a.

Pl. Com. 555. a.

Co. Lit. 335. a.

Co. Lit. 372. b.

Hob. 337.

SECONDLY, Although it was said, that the privity of estate cannot be drawn out of him, they answered, True it is, none can be tenant in tail but the donee and his issue, and that avowry shall be made upon him, and his heir shall be in ward: so where tenant in dower, or by the courtsey, alien their estates, no estate remains in them; yet for the privity which was once in them, an action of waste lies against them, as *Fitzb. N. B. 55. c.* is. And *quoad* the avowry, that may be; for otherwise the donor should confess his reversion to be out of him, and thereby should destroy his avowry, as *Co. Lit. 269. a.* is: and for the wardship, though the privity betwixt the king and the tenant in tail is destroyed, the issue in tail cannot contradict it. And to the objection, that the reversion being in the king is not touched, and of necessity the particular estate must remain for the upholding of the reversion; and that there cannot be a reversion, but in regard of a particular estate remaining; it was thereto answered, that a common recovery before the statute of 34. *Hen. 8. c. 20.* had barred an estate tail, where the reversion in the king was not touched: and the recoveror should have a fee during the time that the tenant in tail had issue; as 28. *Hen. 8. Dyer, 31.* and 15. *Edw. 4. pl. 9.* lord of a villain tenant in tail enters, that shall not touch the reversion; and in *Wiseman's Case (a)*, where tenant in tail of the gift of a common person, remainder to the king at this day, suffers a common recovery, it shall bar the estate tail, but not the remainder; and *Plowd. 557.* tenant in tail of a common person is attainted of treason, the king shall have a fee, yet the fee of the donor is not touched.

THIRDLY, They all argued, that against his feoffment no right remained in him, *nec jus in re, nec jus ad rem*, for the feoffment gave away all his right, interest, and possibilities; as *Hen. 7. pl. 1. 39. Hen. 6. pl. 43. 12. Edw. 4. pl. 32. 1. Edw. 4. pl. 81. 19. Hen. 7. and Plowd. 374.* tenant in tail makes a feoffment, there remains no right in him; and if afterwards a fine be levied by the conusee, the issue in tail is the first who hath right to impeach it.

TO THE FOURTH, That the writ and declaration in a *formedon* do suppose *quod jus descendit*, it was answered, that it was but form, and not *in rei veritate*; and he doth not say *simpliciter descendit jus*, but *descendit per formam doni*: and it is not properly said *descendit jus*, but *devenit jus*; as in *Plowd. 374.* by SOUTHCOTE, WESTON, and DYER, *Justices*: and it is but form, as in waste, supposing that he held *ad terminum annorum*, where he held but for half a year; and 40. *Edw. 3. pl. 5.* and 38. *Hen. 6. pl. 3. in consimili casu*, supposing that he aliened in fee, it is good, though he aliened but for life. So in the case of *Holland v. Lee (b)*, where a fine was levied, and by it the estate tail barred in error to reverse this, it is supposed *quod remansit jus*, or *quod descendit jus*, as the case requires.

TO THE FIFTH, That it is for the greater benefit to the Crown, and the greater discouragement of traitors, &c. it was answered, that the right was to be respected; and it is not to be presumed, that they would commit treason, or had an intent thereto; for such foreign intentions are not to be presumed, as 30. *Hen. 6. "Grant,"* 41. Grant of land after it shall escheat is void, because it is not intendible.

(a) 2. Co. 15. b. and under the name of *Wiseman v. Barnard, Moor, 195.* Hughes' Entries, 37.

(b) See *Darcey v. Jackson, Palm. 128. 149. 224. 1. Roll. Rep. 73. 301. Eliz. 739. 774.*

STONE  
against  
NEWMAN.

And as to the cases pretended to be adjudged, it was answered, that *Walsingham's Case* was impeached by a writ of error, and was affirmed for default in the pleading; and being demanded, If it were for matter of law? it was not answered; and if it had been for the matter in law, they would have been ready for the queen's advantage to have had it so published. Also within two years after (*viz.* in 18. *Eliz.* in the common pleas, in *Moulton's Case*) (a), it was argued openly by all the four Justices, who by intendment had notice of the former judgment; and they all argued, that the estate tail was not forfeited, by reason of this feoffment which saved it, and this judgment was never impeached by writ of error; yet it is very likely, if the Justices of the king's bench had concurred with the Barons for the matter in law, the said last judgment would have been impeached by a writ of error. And as to the judgment in *Sheffield's Case*, it was alledged to be very well known, that some of the Judges who died before their opinions delivered, were against the said judgment, as appeared by their arguments, and that the judgment in that case was obtained by one voice only. And although that judgment should be allowed to be good, yet it much differs from this case; for here the tenant in tail hath neither freehold, possession, nor right.

But after this Term, because the greater opinion was for the plaintiff, it was prayed in the king's bench to have judgment for the plaintiff.

But there it was moved in stay of judgment, that the bar to the avowry was not good:

FIRST, Because it doth not shew, that after the attainder of *Sir Thomas Wyatt* there was any seisin for the queen, and *Sir Francis Wyatt* had good title until seisin.

SECONDLY, Because it is pleaded, that the indictment and proceedings were before the commissioners, and does not say *sub sigillo magno*.

And for these causes the Court would advise (b).

(a) Cro. Eliz. 151. 2. Leon. 211.  
Leon. 232.

(b) These objections were moved again  
in Easter Term, and all the Court agreed,  
that although it were the better course to

shew that it was *sub magno sigillo*, yet being omitted, it is well enough, and good both ways But judgment was entered for the plaintiff. Post. page 461.

## Hilary Term,

11. Car. 1. In the King's Bench.  
 Sir John Brampston, *Knt. Chief Justice.*  
 Sir William Jones, *Knt.*  
 Sir George Croke, *Knt.*  
 Sir Robert Berkley, *Knt.*  
 Sir John Banks, *Knt. Attorney General.*  
 Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

### CASE 1.

### Memorandum.

The deaths of  
 ASHLEY,  
 King's Serjeant.  
 Mr. Recorder  
 MASON and  
 PYE, Attorney  
 of the Court of  
 Wards. CAL-  
 THROP and  
 GARDENER  
 promoted.  
 Jones, 375.

IN the vacation after *Michaelmas Term*, SIR FRANCIS ASHLEY, *the King's Serjeant*, who died the day before the end of the Term in *Serjeant's Inn*; ROBERT MASON, of *Lincoln's Inn*, Esquire, Recorder of *London*, who died in *Lincoln's Inn* 21 December; and SIR WALTER PYE, of the *Middle Temple*, Knight, Attorney of the Court of Wards, who died the 25th of December, were carried down and buried in their several counties, accompanied with two heralds in their coats of arms, with divers coaches of nobles and others, who accompanied their bodies until beyond *Charing Cross*. And HENRY CALTHROP, of the *Middle Temple, London*, was made Recorder of *London*, and so continued three weeks. Afterwards he was knighted, removed, and made Attorney of the Court of Wards the first day of this Term; and THOMAS GARDENER, of the *Inner Temple*, Esquire, was elected Recorder of *London*.

### CASE 2.

### Spooner against Day and Mason.

*Michaelmas Term*, 6. Car. 1. Roll 183.

A prescription cannot be pleaded against a prescription; and therefore if a man prescribe for a common; the plea of a custom to inclose it is void.

S. C. Jones, 375.  
 1. Roll. Abr.  
 401. 565.  
 Cro. Jac. 519.  
 2. Com. Dig.  
 428. 435. 540.

ERROR of a judgment in the common pleas, in an action on the case. Whereas Robert Futter was seised in fee of the manor of *Thompson*, and he and his ancestors, &c. time whereof, &c. had A FOLD-COURSE (a) for his and their sheep, not exceeding three hundred and seventy acres of land, in *Thompson*, every year from fourteen days after the corn was carried away, to continue until *Lady-day*, within the lands not sown again; and shews, that he let by deed to the plaintiff seventy-five acres, parcel of the manor, with the fold-course, for five years, and that the defendants inclosed, and thereby had disturbed him of his fold-course.

One of the defendants pleaded not guilty.

The other pleaded in bar, that there is a custom within the said vill, that any one may inclose any part of his lands lying in the common fields, and therefore he inclosed this land, lying in the common field.

The plaintiff thereupon demurred.

And without any difficulty IT WAS ADJUDGED, that the bar was not good, because he doth not traverse the prescription in the declaration; and he cannot plead a prescription against a prescription; but he ought to answer the prescription alledged in the count.

(a) See *Mr. Hargrave's Co. Lit.* 6. note (1).



In the common pleas an exception was taken to the declaration, That it was not good, because A FOLD-COURSE, being appurtenant to a manor, cannot be divided and annexed to parcel thereof; and therefore that the plaintiff had not any title. But the exception was there over-ruled, and adjudged for the plaintiff; and this point was now assigned here for error; and, after divers arguments, THE COURT this Term adjudged it to be good enough; for being but in nature of a common certain, it may be well divided or annexed to parcel of the manor; and there cannot be any prejudice to the tenants, for they shall not be charged with more than they were before. Wherefore the judgment was affirmed. *Vide* 5. Hen. 7. pl. 7. 1. Hen. 7. pl. 24. 1. Edw. 3. pl. 1. 27. Hen. 8. pl. 10. 11. Hen. 6. pl. 22. 1. Levinz. 231.

The common-  
age of a com-  
mon appurte-  
nant certain,  
may be divided,  
or annexed to  
parcel of the  
manor.  
Jones, 375.  
1. Bac. Abr. 388.  
2. Term Rep.  
415.

Richard Hayes *against* Robert Hayes.

CASE 3.

Hilary Term, 10. Car. 1. Roll 1045.

DEBT, upon an obligation of one thousand pounds, conditioned for the performance of the arbitrament of HENRY CLERK and ROBERT SHARP, of the Middle Temple, Esquires, of all controversies and demands betwixt the said Richard Hayes and Robert Hayes.

Where joint  
claimants submit  
to an arbitration,  
and enter into  
separate bonds  
to the opposite  
party, to abide  
by the award;  
if the award be  
general, that  
such joint claim-  
ants shall do an  
entire thing,  
each of them  
are bound for  
the performance  
of the whole  
award, although  
their bonds were  
several.

The defendant pleaded, *quod nullum fecerunt arbitrium*.

The plaintiff replies, that Robert Hayes, father of the plaintiff and defendant, was seised in fee of divers lands in Kent, and had issue the plaintiff Richard Hayes, the defendant Robert Hayes, and William Hayes, and devised divers lands to the said Robert and William; and that there were controversies betwixt the plaintiff and the said Robert and William concerning the said land, for which the plaintiff entered into bond to the said Robert and William to perform the award of the said arbitrators; and that Robert at that time entered into one bond by himself, and William, at the same time, into another bond, to perform the said award; and shews their arbitrament, that Richard should release to the said Robert and William, &c. and that Robert and William should pay to the said Richard three hundred pounds at such a time and place; and for non-payment of the said three hundred pounds the breach was assigned.

1. Roll. Abr.  
248. 415.  
1. Lutw. 577.  
Plowd. 285.  
1. Bac. Abr. 137.  
1. Com. Dig.  
378. 384.  
Kyd's Treatise  
of Awards, 8.

The defendant hereupon demurred.

FARRER argued for the defendant, that this arbitrament is void; for the defendant's bond is for a reference of all controversies betwixt Richard and Robert, and William is not mentioned in the bond; and the award is betwixt Richard, Robert, and William, and that William and Robert should pay such a sum, and the breach is alledged therein, and for any thing that appears in the bond and condition William is a stranger to the submission, unless by this collateral surmise, which surmise is not allowable; also this surmise is *quasi* a departure from the declaration.

But after divers arguments at the bar, ALL THE COURT resolved, that the replication was good enough to maintain the arbitrament notwithstanding this objection; forasmuch as this is not a bare surmise, but grounded on a deed which is of as high a nature as the other, and made at the same time, it is *quasi* but one submission by several

HAYES  
against  
HAYES.

several bonds, and so the surmise is allowable, and stands well with the bond in question. And although the two brothers did not join in one bond of submission, because they would not be bound one for the other; yet when at the same time they enter into several bonds to perform the award, it is but as one submission, and is not any departure from the declaration; for it is not fitting that the declaration (which is but for the debt upon the bond of *Robert*) should mention any such submission, but it sufficeth to shew it by the replication to maintain this arbitrament.

1. Roll. Abr.  
242.

THE SECOND OBJECTION was, That this arbitrament was not good, because the submission was only for land whereof the father was seised at the day of his death, and devised, or mentioned to be devised, to the said *William* and *Robert*, or to the use of them, and the arbitrament is, that he shall make a release of his right in the lands conveyed or devised, and there is no authority to meddle with the land conveyed.—*Sed non allocatur*; for it shall not be intended that there were any lands conveyed to make the arbitrament void unless it had been shewn, and the breach is assigned for the non-payment of the three hundred pounds awarded. Wherefore rule was given, that judgment should be entered for the plaintiff.

CASE 4.

Bradstock against Henry Scovell and Others.

Trinity Term, 11. Car. 1. Roll 1097.

A fine levied by the heir in tail, who dies without issue in the life-time of the tenant in tail, shall not bar the entry of his younger brother after the death of the tenant in tail.

Jones, 689.  
3. Co. 61.  
Hob. 333.  
3. Com. Dig.  
234.  
2. Bac. Abr.  
530, 531.  
Cruise, 167.

ERROR of a judgment in the common pleas, in an ejectment of a messuage and land in *Wickhampton*, of a lease by *Thomas Baston* to the said *Henry Scovell*, where, upon not guilty pleaded, and a special verdict found, the case was, *Thomas Baston*, seised in fee of those tenements, conveys them to the use of *Thomas Baston* his son and *Edith* his wife, and the heirs of their bodies, for a jointure for his wife; *Thomas* the son and *Edith* enters, and, being seised in tail, have issue *Philip* their eldest son, and *Thomas*, THE LESSOR, their second son; *Thomas* their father dies; *Edith* takes to her second husband *Thomas Bulford*; they, by indenture, for six pounds alien, bargain, sell, and grant to the said *Philip* and his heirs, all their rights, title, and interest which they have in the said tenement, no livery nor inrollment being found: then the said *Philip Baston*, by indenture, for eighty pounds, bargained, sold, and confirmed those tenements to one *Henry Bradstock*, and levies a fine with proclamation to the said *Henry Bradstock*, to the use of him and his heirs; and afterward *Philip* dies without issue, then *Edith* dies; after the said *Thomas Baston* the second son enters and makes this lease, and the defendant ousts him; *et si super, &c.*

The sole question was, Whether this fine by *Philip* the eldest son in the life of his mother, tenant in tail, and he dying without issue in the life of his mother, shall bar *Thomas* the second son, or not?

And after argument at the bar and bench in the court of common pleas, by the opinion of *HEATH*, Chief Justice, *HUTTON*, and *VERNON*, it was adjudged for the plaintiff, that this fine should not be a bar to *Thomas*; but *CRAWLEY*, Justice, to the contrary.

Jones, 34.

And now error being brought, was assigned in point of law; and after several arguments at the bar, ALL THE FOUR JUSTICES agreed

that the judgment should be affirmed; for this fine levied by the eldest son, who was never seised by force of the intail, and dying without issue before the intail descended upon him, is not a fine within the statutes of 32. Hen. 8. c. 36. nor of 4. Hen. 7. c. 24. to bar the intail: for although he be inheritable to the tail, and, if he had survived, his fine had been a bar to his brother, yet forasmuch as he died in the life of his ancestor, and never had the estate tail, the younger brother shall never mention him in a *formedon in the descender* (a), he never being ancestor in tail to his younger brother, nor any such ancestor to whom the land was intailed; and therefore it is not like to *Archer's Case* (b), where the father disseises the grandfather, or is infeoffed by the grandfather, and levies a fine with proclamations, and dies in the life of the grandfather, and afterwards the grandfather dies, his son shall be barred, for he ought to claim by him, and he is one to whose ancestors the land was intailed. And it was compared by BERKLEY to the case where the father is attainted of felony in the life of the grandfather, and hath issue a son and dies; afterward the grandfather dies, the land shall escheat, for the son ought to make his descent by him, which cannot be. But if the eldest son had been attainted in the life of the father, and had died without issue in the life of his father, his second brother should not have been barred. But if the eldest son had survived the father, and died after without issue, his younger brother should never have inherited. And for this point JONES said, that when he was a Judge in the common pleas, it was so adjudged in *The Case of Mackwilliams* (c); and so also in this court in the *Case of Croker v. Kelsey* (d), and afterward affirmed in a writ of error. And although *Littleton* (e) saith, that "if the middle brother make a warranty and die without issue, his warranty is lineal to his younger brother, for that by possibility the younger brother might have inherited, so as he is, *quodammodo*, said to be his ancestor," yet that is only but a possibility, and by reason of the maxim; but it is not to be construed so here in the case of a fine, for it ought to be levied by him who had the estate tail once in him, or to whose ancestor the land was intailed, and by whom the conveyance by descent ought to be made. But where he needs not to be mentioned in the conveyance by descent, there his fine shall never bar. And *Grant's Case* (f) was cited, where lands were devised to one, when he came to the age of twenty-five years, in tail, and he, before the age of twenty-five years, levies a fine with proclamation, and after attained the said age, and had issue and died, this fine shall bar the issue: for although he was not tenant in tail at the time of the fine levied, yet having attained the age of twenty-five years, he was the person to whom the land was intailed; so he is within the words and intent of the statute, that this fine shall bar his issue which claim under that intail. Wherefore here in the principal case ALL THE JUSTICES agreed, that the judgment was well given; wherefore the judgment was affirmed.

BRADSTOCK  
against  
SCOVELL and  
OTHERS.

Hob. 332.  
Moor, 252.  
Post. 525.  
Hob. 258. 332.  
333.  
(a) 8. Co. 88. b.  
5. Com. Dig.  
308.

Hob. 334.  
Dyer, 48. m.  
Jones, 34.

Hob. 258.

Post. 478.  
Jones, 601.

See the case of  
*Johnston v. Bel-  
lamy*, Cro. Eliz.  
122.

(b) Lord Zouch v. Aickin, 3. Co. 90.  
Hob. 258 333. Cro. Car. 435.

(c) Hob. 333. Winch. 41.

(d) Cro. Jac. 689. W. Jones, 60.  
Hutton, 84. Bridg. 27. 2. Roll. Rep.

490. 498. 1. Roll. Abr. 843. Old  
Bendloe, 139. 143. See also Hargrave's  
Co. Lit. 28. b. *notis*.

(e) Co. Lit. 373. 374.

(f) 10. Co. 50. a.



ASE 5.

## Salter against Browne.

Hilary Term, 10. Car. 1. Roll 207.

To say of a man that "he is the reputed father of a bastard-child," is not actionable, unless some special damage ensue.

Ante, 322. 393.  
1. Roll. Ab. 37.  
1. Roll. Rep. 244.  
Cro. Jac. 473.  
Moor, 10. 29.  
Cro. Eliz. 583.  
1. Sid. 61. 396.  
3. Mod. 120.  
Salk. 696.  
2. Mod. 196.  
1. Com. Dig. 193.

**E**RROR of a judgment in the common pleas, in an action for words. Whereas one *Jane Jennings* was delivered of a bastard-child, that the defendant, having communication with one *J. S.* of the plaintiff and of the said bastard-child, said of the plaintiff these words, "He," innuendo the plaintiff, "is the reputed father of that bastard-child," innuendo the said bastard-child.

Judgment after verdict was given for the plaintiff, and error thereof brought and assigned, that these words are not actionable.

And ALL THE COURT, *absente* BRAMPSTON, was of that opinion, unless he had alledged some temporal loss, viz. that he lost thereby his marriage, or that he by this means should be chargeable for the maintenance of such bastard child, and to have further punishment; for it was said that it had been resolved, that a bastard-child of persons able to keep it, and not like to be chargeable to the parish, is not within the statute of 18. Eliz. c. 5. and a reputed father is to be adjudged by the two next justices of the peace or the sessions. Wherefore for this cause the judgment was reversed. *Hil.* 10. Car. 1. Roll 752. such a case and such judgment.

## CASE 6.

## Clothworthy against Clothworthy.

In debt on bond or any special contract, where only part is demanded, satisfaction must be acknowledged for the residue.

S. C. Hetley, 137.  
Cro. Jac. 499.  
Allen, 57.  
3. Bulst. 244.  
Salk. 326.  
3. Term Rep. 65.

**E**RROR of a judgment in a writ of annuity. The plaintiff declared against the defendant *as heir* to his ancestor, who granted an annuity to him of twenty pounds a-year, payable at four Feasts, viz. at *Christmas, the Annunciation, the Nativity of John Baptist, and St. Michael*; and for thirty pounds arrear at *Michaelmas*, 3. Car. 1. before the writ brought, which was the 16th of *April*, 4. Car. &c.

The defendant pleads, *non est factum patris sui*; and it was found against him, and judgment given that he should recover the annuity and arrearages before the writ, and what incurred *pendente brevi*, which amounted to seventy pounds; and the damages and costs; et *quod habeat executionem* of all the tenements descended to him from the grantor of the annuity.

MAYNARD now assigned error, Because the plaintiff demands this annuity and the arrearages thereof to *Michaelmas* 3. Car. 1. and his writ is brought 16 *April* 4. Car. 1. so as there are two quarters of that annuity not demanded, which by intendment are paid, and if they be not paid he ought to have demanded them; for if one brings debt for part of a debt due upon a contract or upon an obligation, and doth not acknowledge satisfaction of the residue, the action is not well commenced.

The judgment on a writ of annuity shall be for the annuity, 229. Co. Lit. 2. Leon. 51.

Also, whether it be due or not due, the judgment is erroneous; for the judgment is, that he shall recover the arrears due before the

and the arrears both before and after the action. Ante, 104. 137. 1. Roll. Ab. 285. 1. Roll. Rep. 88. Cro. Jac. 499. Co. Ent. 50. Hob. 88. 2. Lev. 56. 1. Com. Dig. 363.

writ

writ (which includes these two quarters rents which are not demanded) and the arrears accrued *pendente brevi*, amounting *in toto* to seventy pounds, so as it includes the arrears before and hanging the writ. ROLLE answered thereto, that this peradventure was but the misprision of the clerk in casting up the sum, and then it is no error, but amendable.—But THE COURT answered, and so resolved, that it is no misprision of the casting up, but a misprision in the judgment; wherefore they all held that it was erroneous (a).

CLOTHWORTHY  
against  
CLOTHWORTHY.

Lit. Rep. 245; but neither of them report this point of the case.

THE SECOND ERROR, Because the heir pleading a false plea, which is found against him, the execution ought to be awarded of his proper lands and of his lands descended.—But THE COURT held, that the denying the deed to be his father's, was not a false plea in his cognizance: and although it should be false, yet being charged in respect of his ancestor's deed, the land of his ancestors shall only be taken in execution, for that is the cause of his charge; and if the land of the heir, which is his own proper land, should be liable as well as the land of his ancestor, yet it is not assignable for error, because it is in case and advantage of the heir.

(a) S. C. Hatley, 137. and In debt against an heir on a bond of his ancestor, the judgment, on non est factum, shall be only of assets by descent.  
2. Roll. Ab. 71.  
5. Com. Dig. 214. 301.  
4. Bac. Ab. 67.  
Pl. Com. 440.  
Dyer, 81. a.  
Carth. 93.

But for the first cause rule was given, that the judgment should be reversed, unless, &c.

See 29. Car. 2. c. 3. and 3. & 4. Will. & Mary, c. 14.

Tregmiell and his Wife against Reeve.

CASE 7.

ACTION ON THE CASE; and declares, That Sir John Reeve was seised in fee of a farm, and of an hundred acres of land thereto appertaining; and by indenture covenanted to stand seised to the use of himself and wife for their lives, for a jointure for his said wife, and after to his son and heir, excepting the timber trees, saving that his said wife shall have and take the throwds and loppings of them; and that the said Sir John Reeve died, and she survived, and took to husband the plaintiff; and that the defendant, as heir to Sir John Reeve, cut down five oaks growing upon the said hundred acres, whereby the plaintiff lost all the benefit which he might have had of the throwds and loppings of the said trees.—The defendant pleaded not guilty, and the verdict was given against him.

If a man covenant to stand seised to the use of his son, saving that his wife shall have the throwds and loppings of the trees, an action on the case will lie against the son for cutting down the trees.  
Jones, 376.  
Moor, 7. 837.  
Cro. Jac. 487.  
1. Co. 46.  
4. Mod. 12.  
Shower, 311.  
1. Salk 196.  
6. Mod. 18.  
2. Com. Dig. 559.  
3. Com. Dig. 332.

Hyde took divers exceptions in arrest of judgment. FIRST, That the excepting the trees after the limitation of the use is void, and then, they remaining parcel of the freehold, he might have had repleas; but he could not have this action on the case: for as an exception after the estate limited is void, so after an use settled an exception cannot be of the trees.—*Sed non allocatur*: for an exception may well be to shew his intent that they should not be annexed to the estate for life.

SECONDLY, The declaration is not good, Because he doth not shew that he had not left sufficient trees to have the loppings: as in the case of *estovers*, the owner of the wood may cut down the wood, leaving sufficient for *estovers*.—*Sed non allocatur*: for here the loppings of all the trees are reserved to the wife, all which On an action for waste, where all the loppings are the property of the plaintiff, the quantity cut need not be shewn.

TREGMILL  
against  
REEVE.

An action for  
cutting five oaks  
growing on a  
hundred acres.

she may cut down and sell at her pleasure; so it is a wrong to her to cut down any.

THIRDLY, Because it is supposed, that the defendant cut down five oaks growing upon an hundred acres of land, which is not possible that five oaks should grow upon an hundred acres.—*Sed non allocatur*: for it is to be intended that they grew upon some part of the farm.

In an action on  
the case for cut-  
ting down trees  
the lops of  
which were re-  
served to the  
wife for life,  
the husband  
may sue alone.

Ante, 419.

Post 505.—

FOURTHLY, Because the action is brought by the husband and wife, where the husband alone should have brought the action, for he only might have released the damages, and the wrong is to his possession.—*Sed non allocatur*: for the husband having the land in right of his wife, he may well join her with him in suing for the damages; and she shall have the damages, and the action also, if she survive her husband: wherefore judgment was given for the plaintiff.

Cro. Jac. 110. 2. Vent. 195. Cro. Eliz. 461. 608. Jones, 325. 1. Com. Dig. 574. Strange, 229.

#### CASE 8.

#### Tolson against Clerk.

Trinity Term, 11. Car. 1. Roll 687.

A promise in  
consideration  
that the plaintiff  
would *aliquo*  
*tempore* forbear,  
will not support  
an *assumpsit*.

Ante, 241.

1. Roll. Ab. 23.

Cro. Jac. 250.  
683.

1. Sid. 45.

Hob. 216.

Cro. Eliz. 387.

1. Com. Dig. 138.

ERROR of a judgment in the common pleas, in *assumpsit*. The plaintiff declares, Whereas the defendant was indebted to him in such a sum, that in consideration the plaintiff would *aliquo tempore* forbear him, he promised to pay, &c.; and alledges, that he forbore for a year or more, and that the defendant hath not yet paid, &c.

After verdict upon *non assumpsit*, and judgment for the plaintiff, it was assigned for error by GRIMSTON, and so held to be error, That *aliquo tempore* is so short a time, that it is no consideration, no more than *per paululum tempus*.—Wherefore for this cause the judgment was reversed.

#### CASE 9.

#### Brunsdon's Case.

The traverse (of  
a defendant out  
of custody) for  
a misdemeanor  
cannot be taken  
and tried at the  
same quarter  
sessions of the  
peace.

Post. 448.

2. Inst. 568.

4. Inst. 164.

Jones, 379.

Cro. Jac. 404.

1. Sid. 99. 334.

2. Hale, P. C. 28.

4. Com. Dig.

156.

BRUNSDON was indicted for *extortion* by two several indictments: in the one, that he, as bailiff of the sheriff of *Wiltshire* had received twenty shillings from one *extorsivè colore officii sui* and in the other, that he *extorsivè* took six shillings and eight-pence. These being preferred against him before the justices of the peace at *Michaelmas* sessions last in the county of *Wilts*, and he thereupon committed to prison, was enforced (as he pretended) to plead presently to those indictments. And the same day they were tried, and he convicted, and judgment against him at one and the same sessions, that he should be imprisoned and fined forty pounds for the one offence and for the other twenty pounds, and upon every of them treble damages given, *viz.* for the one three pounds, and for the other twenty-six shillings eight-pence (which was more by six shillings eight-pence than he had received), and to be committed to prison till he had paid those fines and damages. And now upon these judgments he brought several writs of error.

And by GRIMSTON it was assigned for error, FIRST, Because the indictment and the trial were at one and the same sessions, where they ought not to be tried and traversed the same sessions.

SECONDLY



SECONDLY, Because they gave damages to the party, where they ought not to have given any damages (a). *Vide 4. Hen. 5. "Inquest," 55. & 22. Edw. 4. "Coron. 44."* that Justices of gaol-delivery may take inquest the same day; but not so of justices of peace. *Stanford, 155.*

(a) This case was moved again, and for these two errors the judgment was reversed. *Post. 448.*

The King against The Inhabitants of Epworth and Fifteen other Villis.

CASE 10.

Michaelmas Term, 11. Car. 1. Roll 146.

THE king, by a writ out of the chancery, dated 16 June, 11. Car. 1. commanded the sheriff of Lincoln, that he per sacramentum proborum et legalium hominum comitatûs prædicti diligenter inquirat, qui malefactores et pacis regis perturbatores apud EPWORTH, BELTON, et HACKSEY, infra manerium regis de EPWORTH, sepes, fossata, et sensuras, ibidem nuper levata, noctanter prostravissent; et postea per vadios et salvos plegios quos culpabiles invenerit, ad respondendum in banco regis de et super præmissis in Octabis Michaelis insuant; et quid haberet ibi nomina eorum per quorum sacramentum inquisitionem illam faceret, et breve illud.

The sheriff hereupon returned an inquisition taken 3 October, 11. Car. 1. apud LINCOLN, whereby it is found, quod quidam malefactores et pacis regis perturbatores primo Maii, 10. Car. 1. et diversis diebus et vicibus inter the said first day of May, 10. Car. 1. et primo Junii, 11. Car. 1. apud EPWORTH, BELTON, et HACKSEY prædicti, infra manerium regis de EPWORTH prædicti, vi et armis, et cum multitudine gentium ignotorum, 700 perticatas fossatorum sensurarum regis apud EPWORTH, BELTON, et HACKSEY, prædicti, nuper levavit, in noctibus dictorum dierum prostraverunt, ad grave damnum dicti domini regis. Sed qui illa fossata et sensuras, vel aliquam partem eorundem, sic prostraverunt, juratores prædicti penitus ignorant. Et similiter dicunt, quod malefactores prædicti qui malefacta prædicta taliter ut supra dictum est fecerunt, cum tali vi et multitudine gentium, et in nocturnis temporibus prædictis commiserunt et perpetraverunt, ita quod nullus ad eos appropinquare ad ipsos cognoscendos ausus fuit.

Upon this return a writ of distringas issued out of the king's bench, dated 9 October, 11. Car. 1. reciting the said writ, return, and inquisition, commanding the sheriff to distrain propinquas villatas fossatas sensuras prædictas circumadjacentes fossatas et sensuras prædictas prostratas, levare ad custus suos proprios; and commanding him to inquire per sacramentum proborum, &c. quod damnum rex sustinuit occasione destructionis prædictarum 700 perticarum fossatorum et sensurarum, et damna illa nobis restituas.

The writ was returnable Crastino Martini following; and hereupon the sheriff returned, quod villata de EPWORTH, and fifteen other villages there named, are the nearest villages circumjacent to the fore-said ditches and fences, et quod rex sustinuit damna occasione in brevi dicto specificat. ad 2500l. et quod propter brevitatem temporis non potuit levare damna prædicta de terris et tenementis illis, ita quod dicto regi restituat; and returned issues upon the inhabitants of every village ad levationem fossatorum et sensurarum prædicti. ad 20l.

See 13. Geo. 3. c. 81.

F f 2

Afterward

THE KING  
against  
THE INHABI-  
TANTS OF  
EPWORTH, &c.

Ante, 281.

Afterward another writ of *disfringas*, 28 Nov. 11. Car. 1. issued, reciting the first writ and the return thereupon, and the writ of *disfringas* and the return thereupon; and that the king is informed, that the said *fossata et fensuræ nondum levata existunt*, and therefore commanded the said sheriff to distrain the said villages of EPWORTH, &c. *per omnia terras et catalla sua, &c. ita quod ipsi ad cultus suos proprios fossata et fensuras prædicta prostrata levant; ac nobis prædict. 2500l. pro damnis prædictis quæ nos sustinuumus occasione prostrationis prædict. 700 perticarum, fossatorum, et fensurarum, restituant.*

ROLLE upon this moved, that the first writ was not well granted; for it appears by the writ and inquisition, that the prostration began the first day of May, 10. Car. 1. and continued till the first of June, 11. Car. 1. so as it was a short time, viz. but five days before the writ brought, which ought not to be; but there ought to be so long distance as the country may have a convenient time to inquire, which ought to be a year; and so it was held in 12. Jac. 1.

2. Inst. 476.  
2. Litt. Ab.  
217.  
1. Keb. 545.

SECONDLY, It doth not appear that this *prostration* was of any fences, &c. of the common which was improved; for the statute doth not extend to all inclosures, but to the throwing down of fences upon improvements of commons.

THIRDLY, That the writ doth not make any mention that the malefactors were not indicted.

2. Inst. 476.  
1. Bac. Ab.  
393.

BUT SIR JOHN BANKS, the King's Attorney, answered to the FIRST, That he had seen the resolution in 12. Jac. 1. and it was not, that there should be a year to indict the offenders, but there ought to be a convenient time, and that the Court shall adjudge whether the time were convenient.

Ante, 281.

SECONDLY, The statute doth not only extend to the prostration of inclosures to be improved out of the common, but to all inclosures; and it is for the benefit and peace of the commonwealth, and shall be expounded most favourably for the king and the benefit of the commonwealth; and if it extends only to improvement of commons, it ought to have been pleaded (a), that this inclosure was not any parcel of the common improved.

(a) Vide Raym.  
487.

THIRDLY, The defendants should have pleaded, if any of the offenders had been indicted.—*Et adjournatur.*

#### CASE II.

#### Hilton against Bembridge.

Trinity Term, 11. Car. 1. Roll .

Assent to a  
stranger, by ten-  
nant for life, to  
a conveyance of  
the remainder  
in fee, is a good  
attornment.  
S. C. Jones, 376.  
1 Roll. Ab.  
265. 300.  
Co. Lit. 309. a.  
3. C. 2.  
Wright's Ten.  
30.  
Douglass. 283.

TRESPASS *quare clausum fregit*. Upon not guilty a special verdict found, the case was, That George Bembridge was tenant for life, remainder to Anthony Bembridge in tail. Anthony, by his deed, granted the remainder to the plaintiff in fee. The said George Bembridge, being tenant for life, having notice of this grant, said to T. H. and J. S. two strangers, that "he was well pleased and content that the said grant was made to the plaintiff, for he was his cousin." And that the said George Bembridge was dead, and Anthony Bembridge is yet alive: and if this were a good attornment (b), they find for the plaintiff; if not for the defendant.

(b) See 4. & 5. Ann. c. 16. and 11. attornment is taken away; and Mr. B. Geo. 2. c. 19. by which the necessity of *ser's* note, Co. Lit. 309. a.

After

After argument at the bar by WIDDRINGTON, for the plaintiff, and BULSTRODE, for the defendant, upon the first argument ALL THE COURT agreed, that it was an attornment, although the words were spoken to those who were mere strangers, and who peradventure had not any notice of the grant, nor were sent or required by the grantee to take attornment, nor required the tenant to assent, but was a voluntary speech only; for it sufficeth, that the tenant hath notice of the grant and assents thereto. See *Bracton*, fol. 81. And it is for the benefit of the grantee, who having the grant, and accepting of that assent, shall be intended to agree thereto in the life of the tenant for life; because, being a lawful act, the law accounts that he agreed to that attornment: and it is not necessary to attorn to the grantee himself; for all the pleading is, *à quel grant soy attornera*, without mentioning the attornment to be to the grantee or any other: and if the tenant indorse his hand as a witness to the deed of grant of the reversion, it is a good attornment, unless he doth not know what was in the deed; for he ought to have perfect cognizance of the grant, otherwise it is not a good attornment. Whereupon, without further argument, the attornment was held to be good, and adjudged for the plaintiff. *Vide Co. Lit.* 310. a. and 2. Co. 69. a. that assent to a stranger sufficeth. And the case of 28. Hen. 8. "Attornment," 40. that attornment to a servant was not good, was here denied to be law.

HILTON  
against  
BENBRIDGE.

## Stockman against Hampton.

CASE 12.

Trinity Term, 11. Car. 1. Roll 752.

TRESPASS *quare clausum fregit*, and chasing his cattle. The defendant justifies, for that *Sir Bartholomew Michael* was seised in fee, and died seised, which descended to his two daughters and heirs, and he by their command, &c.

The plaintiff replies, That true it is, *Sir Bartholomew Michael* was seised in fee; but he saith, that being so seised, he, in consideration of the love and affection to *Richard Michael* his nephew and others of his blood, by indenture 25th March, 15. Jac. 1. covenanted with *Edward Rogers* and others to stand seised of those lands, to the use of himself, and the heirs male of his body; and for default of such issue, to the use of the said *Richard Michael* for life, remainder to his first son in tail, with divers remainders over in tail, remainder to the right heirs of the said *Sir Bartholomew Michael*; whereby, and by virtue of the statute of uses, the said *Sir Bartholomew Michael* was seised in tail, with the remainders over, and died seised of such an estate, without issue male: whereupon the said *Richard* entered, and the plaintiff by his licence put in his cattle, &c.; and traverseth, that the said *Sir Bartholomew Michael* died seised in fee. Upon this defendant demurs.

And the principal case was, Because the plaintiff claiming by the deed of uses, which cannot commence without deed, doth not shew the same.

In trespass, if the defendant justify by command of the heir of A. who died seised in fee, and the plaintiff replies that A. was seised in fee, but that he covenanted to stand seised to the use of B. where he was seised in tail, and traverses, that A. died seised in fee, the deed declaring the uses need not be shewn.

6. Co. 38.  
Cro Jac. 70.  
217. 673.  
Hob. 38.  
Jones, 377.  
Dyer, 277.  
Carth 316.

Co. Lit. 6. note (4).

By 16. & 17. Car. 2. c. 8. after verdict no judgment shall be stayed or reversed for want of alledging the bringing into court of any bond, bill, indenture, or other

deed mentioned in the declaration or other pleading; and by 4. & 5. Ann. c. 16. the omission is also aided on a general demurrer.

And



STOCKMAN  
against  
HAMPTON.

And this being argued divers times at the bar, ALL THE COURT held, that the plea was good without shewing the deed.

A deed pleaded only as inducement to a traverse, and not belonging to the party need not be shewn.

FIRST, Because the deed doth not belong unto him, although he claims thereby, but to the covenantees, and he hath not any means to obtain the deed; and it should be mischievous to those who claim under such a deed if they should lose their estates, unless they might produce it.

Co. Lit. 226. 393. 3. Lev. 83. 6. Co. 38. Cro. Eliz. 711. Cro. Jec. 70. 5. Com. Dig. 131.

A party claiming under *cestui que use* need not in pleading shew the deed.

SECONDLY, Because it is an estate executed by the statute of uses; so the party is in by the law as tenant in dower, and tenant by statute staple, or merchant, which have a rent-charge extended by them; as 31. Edw. 3. "*Monstrans de faits*," 38. and 35. Hen. 6. *ibid.* 118.

Ante, 209.

An inducement to a traverse is not traversable.

THIRDLY, and principally in this case, Because it is but an inducement to the traverse, and is not answerable by the defendant; but he ought to maintain his bar, that he died seised in fee. *Vide* 27.

Ante, 105.

Co. Lit. 282.

Moor, 428.

Hob. 104.

Poph. 101.

Lutw. 1438.

Carth. 99.

Cro. Eliz. 671.

890.

Hen. 8. 2. 21. Edw. 4. 8. Plow. Com. 64.

Whereupon ALL THE COURT agreed, that the replication was good, without shewing the deed. Wherefore it was adjudged for the plaintiff. *Vide* 14. Hen. 8. 9. per POLLARD; 20. Hen. 7. 8. per FINEUX; 10. Co. 92. *Leifeild's Case*; Co. Lit. 226. 28. Hen. 8. fol. 29.

#### CASE 13.

#### Slocomb's Case.

In error, if the declaration and verdict be good, the Court will give such judgment as ought to have been given in the court below; but if bad, they will reverse the first judgment, and also adjudge *quod querens nihil capiat, &c.*; and if the entry be "*ideo concessum*" instead of "*consideratum*," it is bad. *Sed vide* Carth. 180.

1. Roll. Ab. 771. 774.

Cro. Jac. 4.

107. 386. 632.

Hobart, 194.

Yelv. 130.

1. Vent. 27.

Salk. 24. 262.

401.

2. Bac. Ab. 230.

Co. Lit. 39. a

Cowp. 843.

ERROR of a judgment in *Bath* in an action for words; where the judgment, after the verdict for the plaintiff, was given for the defendant, intending that the action did not lie for the words: and the entry is, "*ideo concessum est, quod querens nihil capiat per billam*," which was held a manifest error; for it should have been, "*ideo consideratum est*."

Then GERMYN, for the plaintiff in the writ of error, moved, that judgment should be given for him upon the verdict, and that the declaration is good. And it was agreed by ALL THE COURT, if the declaration and verdict be good, then judgment ought to be given for the plaintiff: whereof JONES doubted at the first, but at last agreed thereto; for we are to give such judgment as they ought to have given there, so as the plaintiff shall recover, if the declaration be good.

HYDE now moved, that the judgment in the inferior court was good for the matter, and that the declaration was ill: for he there declared, Whereas such a suit was depending in the court of the Guildhall in *Exeter*, shewing what, *et quod superinde exitus per partem fuit junctus*; and at the trial the plaintiff was produced as a witness there to prove the issue, and was sworn and gave his evidence upon his oath; that the defendant, having communication with one *Margery Slocomb* of this trial and oath by the plaintiff, spake these false and scandalous words of the plaintiff to the said *Margery*, "*Thy brother (innuendo the plaintiff, brother of the said Margery) hath taken a false oath in such a cause*" (*innuendo the said cause*). The defendant pleaded not guilty; and found for the plaintiff.

plaintiff, and damages and costs assessed. The Court upon the matter adjudged, that the declaration was not good.—HYDE assigned the cause to be, Because he doth not shew how the issue was joined; for he saith *ad exitum per patriam*: and though by implication it is to be intended that issue was well joined, yet it is not so alledged; and then no lawful trial wheretō he might be produced as a witness.—*Sed non allocatur*: for when it is shewn that at the trial he was sworn, it implies all necessary circumstances, that the issue was joined and the jury sworn; and that to the said jury, upon this issue, he gave his evidence.

THE SECOND EXCEPTION to the declaration, Because in the communication alledged with *Margery Slocomb*, of this oath at the trial he saith, "Thy brother" (*innuendo* the plaintiff, brother to the said *Margery*) "hath made a false oath, &c." and in all the declaration it is not averred expressly that she was his sister, nor that he was her brother, but after the *innuendo*; nor is it averred that he was the sole brother of the said *Margery*; and that which comes under or after the *innuendo* is not an express averment, nor issuable; wherefore the declaration is not good.—ALL THE COURT was of this opinion (*absente BRAMPSTON*); wherefore it was ordered, that a special entry should be made, that the first judgment should be reversed for the manner of the entry, "*ideo concessum*."

But because it appeared to the Court that the declaration was insufficient, it was adjudged here, "*quid querens nil capiat per billam*."

SLOCOMB'S  
CASE.

In an action for saying, "Thy brother hath taken a false oath," it must be averred that the person spoken of was the brother of the person spoken to; for an *innuendo* to this effect is not sufficient.  
Ante, 177.  
4. Co. 17. 20.  
1. Roll. Ab. 82.  
Cro. Eliz. 609.  
Cowp. 276.

### Corbett against Barnes.

CASE 14.

AUDITA QUERELA by three, to avoid a judgment in this court against the said three in trespass; where one of them was only taken in execution upon this judgment, the others not being touched.

MAYNARD took exception to the writ and declaration, Because he who was in execution ought only to have had the *audita querela*, and the others, who never yet were grieved, ought not to join with them; and to prove this, he relied upon 35. Hen. 6. pl. 1. F. N. B. 104. 17. E. 3. pl. 27.—*Sed non allocatur*; for they being parties to the judgment, and liable to the execution, although it was never had against them, yet for their indemnity may well have an *audita querela*, and join with him who is in execution.

A person privy to the judgment, and liable to but not in execution, may join in an *audita querela* with him who is in execution.  
Jones, 377.  
3. Co. 14.  
F. N. B. 103.  
Co. Lit. 100.  
1. Roll. Ab. 306.  
Ld. Ray. 126.  
1. Com. Dig. 461.

SECONDLY, He excepted against the surmise in the *audita querela*, that it was not good; which was, Whereas one J. S. was sued in the common pleas for a battery, supposed to be done in London, and by verdict the plaintiff had judgment for thirty pounds damages and costs; and the said J. S. was taken in execution for these damages and costs: and afterwards he and the two other defendants were sued in this court for this battery, supposed to be done in the county of Hereford, and they three were by verdict and judgment condemned in this court: and it appeared that this action and the action in the common pleas were for one and the same battery, and not for divers; and that the then plaintiff had acknowledged satisfaction

An *audita querela* by three, suggesting that an action of battery was brought against one in London, and against the other two in Hereford, is good; for trespass may be laid in any county.  
1. Com. Dig. 123.

CORRET  
against  
BARNES.

tion of the said judgment to *J. S.* in the common pleas, and yet notwithstanding, against law, had sued to have execution of the said judgment, where he was satisfied for the same trespass: and hereupon the defendant demurred:

MAYNARD now, for the defendant in the *audita querela*, moved, that this cannot be surmised, Because the one recovery being in *London*, and the other in the county of *Hereford*, it cannot be intended to be one and the same battery.—*Sed non allocatur*: for the action, being transitory, may be laid in what county the plaintiff will: and it being averred by the record to be one and the same trespass, and not divers, &c. and this being confessed by the demurrer, the plaintiffs are not such strangers to the record, but that they may have benefit of the satisfaction by the said record: and because they are all parties to the act, the law gives liberty to every of them to take advantage of any one of their acts for the other's discharge; as if a release were to one of the trespassors, and the other had it to plead, they should take advantage thereof to discharge themselves accordingly. Wherefore it was held, that the surmise was good, and adjudged for the plaintiffs, unless, &c.

CASE 13.

Gryffyth and his Wife against Lewis and his Wife.

Michaelmas Term, 10. Car. 1. Roll 397.

A writ of *quod ei desorreat* lies at common law; it is also given in certain cases by the statute of *Westminster 2.* and it also lies by the statute of *Rutland* in the courts in Wales; in which last case it is not necessary to recite in the writ the species of estate it is brought to recover.

Ante, 178.

S. C. Jones, 380.

ERROR of a judgment in the grand session in the county of *Pembrokeshire*, where the plaintiffs had brought a *quod eis desorciant*, and made their protestations *prosequi breve illud in forma et natura brevis de quod eis desorciant ad communem legem, secundum formam statuti de Rutland, et petunt messuagium et terras in R. quæ clamant tenere sibi et hæredibus de corpore ipsius MARIÆ, ut in jure ipsius; et unde dicunt quod quidam THOM. BENNET fuit seistus in feodo*, and gave these tenements after the statute of 27. *Hen. 8. c. 10. of Uses, viz. 42. Eliz.* to feoffees, to the use of the said *Mary* and the heirs of her body, by virtue whereof they entered, and took the *esplees* within twenty years last past.

Upon this writ and count the tenants demanded judgment of the writ, because they say the said writ is a writ formed by the statute of *Westminster 2. edit. 13. Edw. 1. c. .*; by which statute it is provided, "*quodd quicunq. tale breve intulerit, debet in brevi suo mentionem facere de statu quem clamat habere in tenementis petitis, &c.*" and in this writ there is not any such mention; *et hoc, &c.*; whereupon they demanded judgment of the writ, &c.: and the demandants thereupon demurred. And IT WAS ADJUDGED there that the writ should abate.

And now this matter was assigned for error, and was divers times argued at the bar, and this Term by GLYNN, for the plaintiff in the writ of error, and by BEARE, for the defendant.—And ALL THE JUSTICES *seriatim* delivered their opinions for the plaintiff in the writ of error, that this writ was good; for it is given by the statute



of 12. Edw. 1. c. . of Rutland, called *Statutum Walliæ* (a), where this writ, as here, *verbatim*, is set down, and there saith, that *commune breve quod in aliquo casu tangit jus, et in aliquo casu tangit possessionem*; and in the end of the said writ it is, *et similiter conceditur istud breve coram Justitiariis de banco, si petens voluerit*: and although the statute of *Westminster* 2. c. 4. gives a special writ of *quod ei deforceat* in special cases, where the tenant for life, tenant in dower, or tenant in tail, and so by equity where tenant by the courtesy, lose their lands by recovery by default; and in such case the writs make mention of their estates; yet this being made anno 13. Edw. 1. c. . doth not take away the statute of *Wales*, made 12. Edw. 1. c. . which gives the *quod ei deforceat*; and this hath been the common practice ever since in *Wales*, as in 2. Edw. 4. pl. 12. by NEEDHAM, who was Justice of *Chester*, appears. And although in 2. Edw. 4. pl. 11. it is held, that a *quod ei deforceat* was not at the common law, as appears by 33. Hen. 6. pl. 46. and 10. Hen. 7. pl. 9. by FROWICK and by BRACON, that this writ was given where one is deforced of land: and the YEAR-BOOK of 2. Edw. 4. is to be intended, that it was not a *quod ei deforceat* at the common law, where a recovery was by default against a particular tenant; for he had not any remedy until the statute of *Westminster* 2. and it is only given by the statute: but in other cases, upon a disseisin or matter in fact, a *quod ei deforceat* lies; and the statute of *Rutland* proves that a *quod ei deforceat* was at the common law: and although this statute of 13. Edw. 1. c. . comes after the statute of 12. Edw. 1. c. . which gives the *quod ei deforceat*, that doth not take away the statute of 12. Edw. 1. c. . but that he may have a *quod ei deforceat*, and make his protestation *prosequi* in nature of what writ he will; as the statute of 13. Edw. 1. c. . which gives the *formedon in descender*, doth not take away the custom of *London*, that they shall have a writ patent, and shall make their protestation *prosequi in natura brevis de formedon in descender et droit close in auncient demeasyn*, or make their protestation *prosequi* in nature of any other writ that they will; as *Fitzh. N. B.* and *Old Book of Entries*, fol. 233. & 234. appears. But JONES doubted thereof, whether this writ lies at the common law.

And although BEARE objected, that if this writ be warranted by the custom of *Wales*, it ought to be shewn in pleading, especially to reverse a judgment—Yet *non allocatur*; for the Court here shall take consufance of their customs and proceedings, especially being warranted by the statute of *Rutland*. Wherefore it was adjudged for the plaintiff in the writ of error, that the judgment should be reversed, and that the writ should stand, and that the tenants shall plead thereto the next Term.—SO NOTE, That for lands in *Wales* there may be pleading here.

GRYFFITH  
and his WIFE  
against  
LEWIS and his  
WIFE.

(a) See this statute in the Appendix to the 9th vol of Russell's edition of the Statutes.

2. Inst. 358.

2. Saund. 38.

2. Keb. 553.

1. Mod. 7.

2. Inst. 350.

A writ of *quod ei deforceat* on the statute of *Rutland* is good, without shewing the custom of *Wales*.  
Post. 562.

## CASE 11.

## Moyser against Gray, MAYOR OF BEVERLEY.

*Michaelmas Term, 11. Car. 1. Roll 500.*

A justice of the peace may take money in *deposito* for surety of the peace; but the sheriff cannot receive money from a plaintiff in *replevin* by way of pledges  
 Post. 594.

§ C. Jones, 378.

2. Inst. 340.

Dalt. c. 119.

2. Espin. Dig. 4.

**ACTION ON THE CASE.** Whereas the plaintiff distrained for 7l. 10s. rent, reserved on a lease made to *John at Stile*; and thereupon the said *John at Stile* brought a *replevin* directed to the said mayor, commanding him to accept pledges of *John at Stile*, the plaintiff in the *replevin*, and to deliver the cattle according to the statute of *Westminster* 2.; that the defendant delivered the cattle without finding pledges.

The defendant pleaded, that *John at Stile*, the plaintiff in the *replevin*, delivered to him 3l. 10s. for pledges; which he accepted: and upon this it was demurred.

**ROLLE** now, for the plaintiff, moved, that it was an ill plea; for when he is commanded, "that if the plaintiff find pledges, then he shall deliver," he ought not to take money in lieu of the pledges; for the pledges are found to answer the party, if he hath good cause of avowry, and to be answerable for the amercement to the king, if he be nonsuited, or it be found against him: and although he might take money for pledges, yet he ought not to accept of less than the plaintiff demands.

And ALL THE COURT held the plea to be vitious for both causes: for although, as **BERKLEY** said, a justice of peace may take money to lie in *deposito* for the security of the peace, and the money shall be forfeited to the king if he doth not keep the peace, yet here it must not be so, because the party is interested to have the benefit of the pledges by a *scire facias* if he recover; but he hath not remedy to have the money from the mayor, being in his purse, if he should have judgment to recover. **SECONDLY**, The plea is ill, because it is a lesser sum than what was demanded: but if the mayor had taken but one pledge (if he had been sufficient), it had been well enough; but it is at his peril if the pledge be not sufficient, as it is in *Denbawd's Case* (a). The sheriff may take one surety for appearance to an arrest, notwithstanding the statute of 32. Hen. 6. c. . Wherefore, without further argument, it was adjudged for the plaintiff.

Ld. Raym. 278.  
 Fort. 331.

Cro. Eliz. 624.  
 672. 808. 852.  
 862.  
 1. Com. Dig.  
 480.

(a) 10. Co. 502.—See 11. Geo. 2. c. 19. s. 23.

## CASE 17.

## Girling's Case.

It is a good justification to trespass and false imprisonment, that it was in aid and by command of the sheriff's officer.

Jones, 378.  
 2. Roll. Ab. 567.  
 Cro. Eliz. 181.  
 Cro. Jac. 372.  
 1 Salk. 409.

**FALSE IMPRISONMENT**, for assault, battery, and imprisonment for six days. The defendant pleads to all but to the assault, battery, and imprisonment for six hours not guilty; and for the battery and imprisonment for six hours he justifies, by virtue of a warrant from the sheriff of *Suffolk* to arrest him upon a *latitat*, who directed his warrant to the bailiff of — to execute it, who arrested the plaintiff, and required the defendant to be aiding to him and to keep him; and therefore he detained him for six hours, until the sheriff discharged him; which is the same battery and imprisonment, &c. Upon this plea the plaintiff demurs.

2. Mod. 197. Ld. Ray 230.

A justification to trespass under a writ from the sheriff need not state that the writ was returned.

And **KEBLE** shews, that the plea is ill, Because it is not pleaded that the writ, being executed, was returned; for the writ is conditional.  
 1. Jones, 378. 2. Roll Ab. 563. Ld Ray. 639.  
 tional

tional, *ita quod habeas corpus*, in court *tali die*, &c.: and therefore if the sheriff himself would justify, as here, &c. it is no plea, without shewing the return of the writ; and the sheriff's servant shall not be in a better condition than his master should be.

*Sed non allocatur*: for true it is, the sheriff ought to return his writ, otherwise his justification is not good; but it is not so with his servant, for he hath no means to enforce the sheriff to make return thereof: and that which he did was legally done; and it shall not be made illegal by the sheriff's act in not returning the writ.

SECONDLY, It was objected, that this discharge by parol was not good.—*Sed non allocatur*: for the sheriff may well discharge his servant by parol, that he shall not keep his prisoner any longer; for as he may deliver the prisoner to the sheriff without more circumstances, so he may be discharged by his parol from keeping him any longer. Wherefore it was adjudged for the defendant.

GIRLING'S  
CASE.

The sheriff may  
discharge his  
bailiff by parol.

Wilkinson against Merryland.

CASE 18.

Trinity Term, 10. Car. 1. Roll 1045.

**EJECTMENT.** Upon a special verdict the case was, One died seised of divers lands in *A. B.* and *C.* in fee. The lands in *C.* being in him by way of mortgage, and forfeited (*a*), he devised the lands in *A.* and *B.* to several persons and their heirs, and deviseth to divers persons several legacies, and then adds this clause, "All the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods whereof he was possessed, he devised to his wife, after his debts and legacies paid," and made his wife executrix and died. The wife entered into the land mortgaged, and devised it to the defendant and his heirs, and dies. The lessor of the plaintiff, as heir of the devisor, enters, and makes the lease to the plaintiff, and the defendant actually ousted him.

In a devise of  
"all my goods,  
"leases, estates,  
"mortgages,  
"&c." the word  
mortgages does  
not extend to  
pass an estate  
in fee.

*Vide post.* 449.  
Ante, 37.  
Jones, 380.  
1. Roll. Ab. 415.  
6. Mod. 100.  
Powel 153. to  
156.  
2. Bac. Ab. 55.  
Gilb. Dev. 24.  
12. Mod. 594.  
2. Vern. 625.  
Cowp. 306.  
Doug. 759.

The sole question was, Whether the fee passed to the wife by this devise, by the name of "all his estate, mortgages, &c.?"

And THE COURT held, that no fee passed to her. Wherefore rule was given, that judgment should be entered for the plaintiff, unless cause was shewn to the contrary (*b*).

1. Term Rep. 411. 2. Term Rep. 456. 653. 1. H. Bl. Rep. C. B. 1. 3. Term Rep. 356.

(*a*) In the abridgment of this case 450.

1. Roll. Abr. 834. it is not stated that the mortgages were forfeited. See also post.

(*b*) It was moved again, and adjudged for the plaintiff. See post. 449.

Blague against Gold.

CASE 19.

**TRESPASS.** Upon a special verdict it was found, That *Peter Blague* was seised in fee of two houses in *Andover*, the one called "THE CORNER-HOUSE," in the tenure of one *Binson* and *Nott*, and of another house thereto near adjoining, in the tenure of *Hitchcock*. He deviseth his house called THE CORNER-HOUSE, in *Andover*, in the tenure of *Binson* and *Hitchcock*, to *J. S.* in fee.

A devise of a  
house called  
"The Corner-  
"house," in the  
tenure of *A.*  
and *B.* is a suf-  
ficient descrip-  
tion to pass the  
house, although  
it be in the te-  
nure of *A.* only.  
Ante, 130.  
S. C. Jones, 379.  
1. Vezey, 437.

The question was, Whether the house in the tenure of *Hitchcock*, adjoining to the corner-house, shall pass or no?

And IT WAS RESOLVED, that it shall not, but only the corner-house, in the occupation of *Binson* and *Nott* (if they occupy jointly)

1. Roll. Ab. 623. Cro. Eliz. 113. 4. Mod. 132. 141. 1. Salk. 225. 235. 1. Vezey, 437. 416. Cowper, 363. 808. Doug. 762. 2. Term Rep. 498.

shall



BLAGUE  
against  
GOLD.

(a) This case  
was moved  
again in Trinity

shall pass; but if they occupy severally, viz. one part in the tenure of *Binson*, and the other part in the tenure of *Nott*, severally, then only that in the tenure of *Binson* shall pass, and not the residue in the tenure of *Nott*. Wherefore rule was given, unless other cause were shewn to the contrary, that judgment should be for the plaintiff (a).

Term, 13. Car. 1. and judgment given for the plaintiff. Post. 473.

## CASE 20.

## Bumpsted's Case.

*Quod vide ante, page 438.*

Justices of the  
peace cannot  
enquire, try, and  
determine offen-  
ces on one and  
the same day

Ante, 315. 340.

438.

Post. 583.

S. C. Jones, 379.

2. Roll. Ab. 625.

1. Sid. 99. 335.

Cro. Jac. 404.

2. Inst. 568.

4. Inst. 164.

4. Com. Dig.

156.

2. Hawk. P. C.

571.

3. Bac. Ab. 259.

THIS Case was now moved again by KEELING, junior; and he insisted upon for error, That neither justices of peace, nor Justices of oyer and terminer might enquire, and take traverse, and determine indictments the same day: but Justices in eyre and gaol-delivery might, because there is warning given long before of their coming, and the offenders may know what matters are determinable there: and there is a precept for jurors to come out of all parts of the county to try and determine offences before committed, whereof the prisoners may take cognizance; and it is for the speedy delivery of the prisoners; and for this reason compared to the proceedings in this court, which is as the general eyre; as 27. *Affise*, 1. Where the proceedings are for offences committed in the county of *Middlesex*, this court is as eyre, to proceed *de die in diem*, and to award *venire facias* returnable the next day, or at another day after, according to their appointment, without regard of fifteen days betwixt the *teste* and return; but if any indictments be removed out of *London*, or out of the sessions of the peace in *Middlesex*, by *certiorari*, or out of any other county, where the defendant is to plead here to the issue, the usual course is to award a *venire facias*, and to have fifteen days betwixt the *teste* and return: *à multo fortiori* in the sessions of the peace, or before justices of oyer and terminer. And for this point, VIDE 4. *Hen. 4. "Enquest,"* 5. by HANKFORD, 22. *Edw. 4. "Coron."* 44. 2. *Hen. 8. pl. 159. in Kelloway, Staunforde*, 156.—ALL THE COURT was of this opinion, that justices of peace may not enquire, try, and determine civil offences in one and the same day; for the party ought to have convenient time to provide for the trial.

Where damages  
are given by sta-  
tute to the party  
grieved, they  
cannot be reco-  
vered on an in-  
dictment, unless  
that mode be  
expressly point-  
ed out; but  
must be sued for  
by action on the  
statute.

Jones, 380.

1. Roll. Ab. 220.

Cro. Jac. 643.

2. Hawk. P. C.

361.

2. Hale, 171.

1. Burr. 545.

THE SECOND ERROR assigned was, That they awarded to the one treble damages, viz. where he took twenty shillings *extorsivè*, they awarded to the party three pounds, and forty pounds fine to the king; and upon the other indictment, where it was found that he took six shillings eightpence *extorsivè*, they awarded, that he should pay to the party for damages 26s. 8d. (so a quadruple value) and twenty pounds fine to the king;—which ALL THE COURT clearly held to be erroneous: for although by colour of the statute of 23. *Hen. 6. c. 10.* where treble damages are given to the party, they might assess them, yet it is here undue and erroneous; for they ought first to have enquired of the damages, for peradventure it may be more or less, according to the circumstances: but they may not assess themselves without enquiry by the jury, for the jury ought to have found the damages, and then they might treble them; and for the other quadruple damages, it is without colour and out of the

4. Com. Dig. 156. 2. Bac. Ab. 12.

statute: and the indictment is not *contra formam statuti*, as it ought to have been, if they would proceed upon the statute.

ALSO, it is doubtful whether this statute extends to *extortions*, unless taken upon arrests; for the statute doth not speak but of arrests, and extortions taken upon them. But THE COURT resolved not this point.

But for the said two former errors the judgment was reversed.

BUMPTSTED'S  
CASE.

*Qu. If 23. Hen. 6. c. 10 extends to extortions, except upon arrests.*  
1. Hawk. P. C. 316.

### Bell's Case.

CASE 21.

BELL was indicted, That he feloniously, 8. *Jac. 1.* stole a silver ladle of plate from KING JAMES, whereas in truth it was the plate of QUEEN ANNE, and stolen from her; for which he obtained his pardon by the queen's means. He was now indicted again for stealing the same plate; and, Whether he should have the benefit of the general pardon of 21. *Jac. 1.* without pleading it and praying a discharge, because there is a special exception in the pardon of goods taken away, purloined, or stolen from the king? was the question. —HENDEN moved, that this exception is to the taking away of goods, &c. as trespassor, whereby the property of the goods is saved to the king, and doth not except the felony;—but THE COURT doubted hereof, whereupon they advised him to plead. YEAR-BOOKS 26. *Hen. 8. pl. 7.* 4. *Hen. 7. pl. 8.*

1. Leon. 28. 3. *Inst.* 234. Cro. Eliz. 153. 768. 778. Lane, 71. 1. *Willf.* 214. 1. Hawk. P. C. 561.

A general pardon where there are exceptions must be pleaded with the usual averments.  
*Ante*, 32.  
Dyer, 85.  
Cro. Jac. 149.  
Shower, 100.  
1. Lev. 26  
Plowd. 103. 484.  
6. Co. 68.  
Hardres, 367.  
Carth. 132.  
S. P. C. 103.  
3. Bac. Abr. 803.

### Wilkinson against Merryland.

CASE 22.

*Ante*, Page 447.

THIS Case was now moved again by DENN, an apprentice of the law; and he urged strongly that an estate in fee passed: for inasmuch as he had disposed of divers of his lands to his brothers and their heirs, and divers personal legacies to them and to others, but of those lands in question (being mortgaged to him and his heirs, and forfeited) he had not made any disposing, he devising the residue of all his goods, leases, estates, mortgages, &c. to his wife, all the estate which he had in the mortgage (which is a fee simple) passed thereby; for it being in a will, shall pass according to his intent, as devise of land in *perpetuum* shall pass the fee (a). And the case in *Dyer* (b), devise of the fee simple of his house in *Soper-lane* to his wife a fee passed without the word "*heirs*," and other cases to that purpose, to shew that a fee passed by the intent of the deviser without the word *heirs* (c)

A devise of "all my goods, leases, estates, mortgages, &c. whereof I am possessed," will not pass a fee simple which the testator had by way of mortgage and forfeited, unless he had mentioned that he had such an estate  
*Vide ante*, 37. 369. 447.

But JONES and MYSELF continued our former opinion, that no fee passed. But the greater question would have been, Whether an estate for life had passed to the wife if she had been alive? because it is coupled only with personal things, as "goods, leases, estates,

12. Mod. 594.  
Prec in Ch. 471.  
Noy, 48.  
Powell on Mort. 153. to 157.  
Cowp. 258.

1. *Eq. Ca. Ab.* 211. 2. *Vernon*, 625. *Raym.* 453. 3. *Com. Dig.* 24. 2. *Atk.* 102. 1. *H. Bl. Rep.* C. B. 3. 1. *Term Rep.* 411. 2. *Term Rep.* 656. 3. *Term Rep.* 356.  
(a) *Ante*, 29. See also *Jones*, 195. (c) See *Bendlow*, 9. 1. *Roll. Abr.* 834.  
1. *Roll. Abr.* 222. Co Lit. 9. b. 4. *Inst.* 6. Mod. 110. *Moor*, 57. 2. *Willf.* 6.  
4. and Year-book 40. *Hen. 7. pl. 7.* 2. *Atk.* 71. Cro. Eliz. 204. 3. *Com. Dig.* 25.

"mortgages,

WILKINSON  
against  
MERRYLAND.

Ante, 369.

"mortgages, debts, &c." which may be intended, that he meant only but estate for years, or mortgages for years; and so much the rather by reason of the words, "whereof I am possessed."—And BERKLEY, *Justice*, (who was absent the day before), concurred in opinion; for the heir shall not be disinherited, nor the fee passed away without an apparent intent out of the words of the will. And in this case it doth not appear that he intended to pass but such things whereof he was possessed, which extend only to things personal, or leases, whereof he is *possessed*, and not to freehold, whereof he is said in law to be *seised*. And peradventure he was not possessed of this land; for it is not found, that the mortgagee entered and was in possession: and commonly in mortgages, the mortgagor retains the possession until the mortgagee enters for a forfeiture.—Wherefore it was appointed, that judgment should be entered for the plaintiff. But they agreed, if he had devised "all his estate in such land," or had mentioned that he had such land mortgaged in fee, and devised "his mortgage," the fee had passed.

Ante, 37.

CASE 23.

Cleve against Veer.

Trinity Term, 11. Car. 1. Roll

If the conusee of a statute staple die, and his executor sues an extent in chancery, but before execution executed the executor dies, and administration *de bonis non* is granted to C. who continues the process, and after the extent returned sues out a *liberate* of the conusor's lands, which are taken in execution upon the *extendi facias* brought by the executor of the conusee, and has them delivered to him; the extent is void, and the conusee may recover the lands back by an action of *ejectment*.

Jones, 385.

2. Roll. Ab. 467.

**EJECTMENT** on a lease by *Edward Dobbs* of lands in *Duff-born Abbots*, in the county of *Gloucester*. Upon not guilty pleaded,

A special verdict was found, that the said *Edward Dobbs* was seised in fee tail of that land, and being so seised, was bound in a recognizance, in the nature of a statute staple, according to the 23. Hen. 8. c. 6. acknowledged before SIR HENRY HOBART, *Chief Justice* of the common pleas, in eight hundred pounds, to *William Blythe*: that he, the said *William Blythe*, 21. Jac. 1. made *Elizabeth Throgmorton* his executrix, and died, 1st July, 1. Car. 1.: that the said executrix proved the will; and for the said eight hundred pounds, 9th July, 1. Car. 1. sued out of the chancery an *extendi facias* returnable in chancery *Ostabis Michaelis*: that afterwards, and before the return of the writ, viz. 17th August, 1. Car. 1. the said *Elizabeth* the executrix died: and that 22d September, 1. Car. 1. the sheriff *virtute brevis prædicti cepit inquisitionem*, whereby was found, that the said *Edward Dobbs* was seised in fee tail to him and the heirs males of his body, of the said tenements in question, at the time of the recognizance, of the annual value of 14l. 4s. 10d. and at the day returned this inquisition into chancery. They find, that on the 19th August 1625, which was in 1. Car. 1. administration of the goods of *William Blythe*, not administered by *Elizabeth Throgmorton*, who died intestate, were committed to *Robert Throgmorton*, who, 22d May, 2. Car. 1. obtained a *liberate* out of the chancery to have the said lands delivered to him the said *Robert Throgmorton*, administrator, which was returned: that 2d June, 2. Car. 1. the sheriff delivered the said lands to the said administrator, *tenendum*, according to the said extent; whereby he entered and was seised *prout lex, &c.*: and that the said *Edward Dobbs* entered



and let to the plaintiff, *prout* in the declaration, whereby he entered and was possessed, until the defendant, as servant to the said *Robert Throgmorton* the administrator, ousted him; and if, &c.

BULSTRODE and ROLLE, upon this special verdict, argued at the bar, that this extent and *liberate* were void; for the extent being sued by the executrix upon the statute made to her testator, and she dying before the inquisition taken, the inquisition taken after the death of her who sued it was void: for the writ is to apprise and seize into the hands of the king *ut ei liberari faciamus* to the said executrix; and she being dead before the said inquisition was taken (so as it cannot be delivered unto her), the inquisition taken after and returned is void: and for this they relied upon 36. *Hen. 6. Bro. tit. "Statute Merchant,"* 43.

SECONDLY, It was objected, admitting the extent be not void for that cause, yet the *liberate* is not well executed to deliver it to the administrator; for the executrix suing it as executrix of *William Blythe* the testator, and she dying intestate, this writ is sued by the administrator, who comes *paramount* her, and claiming immediately from the first intestate, cannot upon this extent sued by the executrix have the *liberate*; but he ought to commence *de novo*, and procure a new certificate, and a new extent and *liberate*: and compared it to 26. *Hen. 8. pl. 7.* and the case 23. *Hen. 8.* cited 1. *Co. 96.* in *Shelley's Case*, that if an executor sue a debtor upon an obligation made to his testator, and recover, and die intestate, the administrator of the first man cannot have a *scire facias* upon this judgment (*a*), because he comes in *paramount* the executor who recovered, but he ought to begin *de novo*: and also compared it to the cases of a *statute merchant*, where the conusee procures it to be certified into the chancery, and a *capias* thereunto returnable into the common pleas (as is usual), or into the king's bench (*b*), and the conusor is returned *non est inventus*, and after the conusee makes his executor, and dies before the execution made by *extendi facias*, his executor may not have an *extendi facias*, but ought to have a new certificate out of the chancery, and a new *capias*, as it is *F. N. B. 131. Dyer, 180. 17. Edw. 3. 31. 25. Edw. 3. 2.*

Ante, 167. 208.

227.

1. Sid. 29.

Post. 457.

JONES and BERKLEY, *Justices*, held, that for both causes the *liberate* was not well executed, but void.

But I held the contrary: yet to the first I agreed, that if an extent be taken in the name of one who is dead before the *teste* of the writ it is void, according to the said YEAR-BOOK of 36. *Hen. 8.*; but where an extent is sued, and the party who sues it dies after the *teste* of the writ, and before the inquisition taken, in that case the sheriff ought to enquire what lands the conusor had at the time of the recognizance acknowledged, and to make enquiry of the value of them, and to seize into the king's hands, and return them into chancery: and the sheriff is not bound to take notice of the party's death who sued it, for he is only to execute and return his writ: but if execution be sued in the name of one who is dead, before the

(a) But see now 30. Car. 2. c. 6. by which this case is provided for. (b) *F. N. B. 131. 2. Vent. 326. 4. Com. Dig. 501.*

*teste,*

CLEVE  
against  
VEER.

CLEVE  
against  
VER.

*teste*, it is merely false and void; and upon this if the party be taken, he shall have remedy by *audita querela*, or otherwise, as the case requires.

Post. 459.  
5. Co. 9. b.

SECONDLY, *I* held, that the *liberate* was well executed at the suit of the administrator; for *I* agreed the cases, that an administrator shall not have a *scire facias* upon a judgment obtained by an executor, because he comes *paramount* that judgment, and is not privy thereto; and that if a testator procures a certificate upon a statute merchant, and a *capias* is returned into the common pleas, and the testator dies after the return, and before the *extendi facias* awarded, the executor must have a new certificate and a new *capias*, and shall not have an *extendi facias* upon the *capias* returned, because he is another person and in another court; but upon a statute staple, or a recognizance upon the 23. Hen. 8. c. 6. in nature of a statute staple, a certificate being made and delivered into the hands of the clerk of the crown in chancery, in that case, by a warrant from the lord keeper, he shall have an *extendi facias* thereupon; for this being executed and returned, is delivered unto the petty bag: and although he who procured it be dead, yet being all in one court, and appearing on record, it is not the course to have a new certificate and extent; but the executor or administrator, upon his oath in chancery, and shewing of the testament or letters of administration, shall have a *liberate*, without being put to a new certificate and new extent, because it is all one and the same court.

THE CLERK OF THE PETTY BAG said, It is the usual course in chancery when there is an *extendi facias* upon a statute staple, or a recognizance in nature of a statute staple, at the suit of one who dies, that the executor or administrator, upon his oath that he who sued it is dead, is to have a *liberate* reciting the former extent. And of this BRAMPSTON doubted.—*Et adjournatur (a)*.

(a) It was moved again, and judgment given for the plaintiff. Post. 457.

#### CASE 24.

#### King and his Wife against Fitch.

*Ante, Page 414.*

In waste in a house and gardens, if the jury find *small damages* in one place only, the Court will adjudge it *no waste*.

1. Roll Ab. 786.  
Cro. Jac. 31.  
Winch, 5. Bull. N. P. 120.

ERROR of a judgment in *waste*.—BABINGTON assigned for error (which was not any of the errors assigned in the record), That judgment being given by default in a writ of waste, made *in domibus, gardinis, et pomariis*, assigning the waste to be done in the houses in divers places, and in the orchard, in cutting down of twenty apple-trees; and upon the writ of enquiry of waste, the waste being found to be in cutting down of two apple-trees, &c. *et quod nullum aliud fecerunt vastum*; that this finding is imperfect.

In waste in houses, gardens, trees, and that the plaintiff ought to be *in misericordia* for the residue, which is not so entered; therefore error: for the precedents are, that where waste is found in part, *et quod nullum aliud fecerunt vastum*; as where waste is assigned in cutting down twenty trees, waste for cutting twenty trees, a finding that two trees were cut is good. Co. Lit. 355. Winch, 5. Lutw. 1547. 1. Term Rep. 56.

SECONDLY, Because waste is found in cutting down two apple-trees, and that the plaintiff ought to be *in misericordia* for the residue, which is not so entered; therefore error: for the precedents are, that where waste is found in part, *et quod nullum aliud fecerunt vastum*; as where waste is assigned in cutting down twenty trees,

Co. Lit. 355. Winch, 5.

Lutw. 1547. 1. Term Rep. 56.

and the jury find that he cut down but two trees, -or less than the KING and his  
 plaintiff assigned, the plaintiff shall be *in misericordiâ*. WIFE  
 against  
 FITCHE.

BERKLEY, *Justice*, held, that it is here good enough; for true it is, there is a diversity where the writ of waste and the count is *in domibus, boscis, et gardinis*; and upon the writ of enquiry of waste the waste is found *in domibus et gardinis*, and nothing *in boscis*; there the plaintiff shall be amerced, because he counts for waste in places where no waste was committed in the one of them; but where waste is assigned in cutting down twenty trees, and the waste is found in cutting down two trees, and so varies only in quantity, it is otherwise. But JONES and MYSELF doubted thereof. In an action of waste for cutting down twenty trees, if the verdict be found for the plaintiff as to two trees only, yet he shall not be amerced for the residue.

Ante, 178.—14. *Edw.* 3. pl. 27. 22. *Edw.* 3. pl. 1. Hobart, 53. Dyer, 75. 115. Palm. 270.  
 Cro. Jac. 630. 5. Co. 49. 8. Co. 61. Co. Ent. 620. Cro. Eliz. 257. 1. Roll. Abr. 217.  
 1. Sid. 232. 2. Mod. 193. 4. Com. Dig. 178.



E  
R  
eise  
ified  
on a  
ucco  
ward  
ment  
or e  
or th  
here  
earl  
be ro  
f L  
to  
cit  
er  
ere  
gs.  
aki  
r a  
nd f  
be ti  
e of  
ands  
nder  
ard  
Th  
e f  
ere

## Easter Term,

12. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*} *Justices.*Sir John Banks, *Knt. Attorney General.*Sir Edward Littleton, *Knt. Solicitor General.*

## Humphreys against Knight.

Trinity Term, 7. Car. 1. Roll 779.

**EJECTMENT.** Upon a special verdict, and not guilty pleaded, the case appeared to be,

Robert Coldham, citizen and freeman of London, being formerly seised in fee of six messuages, in the parish of *St. Mary Magdalen*, devised those tenements by his will in writing, 6. Hen. 7. to the parson and churchwardens of the parish of *St. Mary Magdalen*, and their successors, to the intents and purposes following, viz. that the churchwardens of the said parish should receive the profits of the said tenements; and that ten marks yearly of the profits should find a chaplain for ever, to sing every day at the altar of the said church, and to pray for the souls of him and his ancestors; and to find an anniversary there, and to expend thereupon thirteen shillings and four-pence yearly: and the residue of the profits thereof to be employed about the reparations and church. And they found the customs of London, that "the parson and churchwardens are a corporation, to purchase to the use of their church;" and that "a freeman and citizen of London may devise lands in mortmain." And they further find, that ever since the said will, the said ten marks *per annum* were employed accordingly for the finding of a chaplain, and the *gs. 4l. per annum* for the maintenance of an anniversary, until the making of the statute of 1. Edw. 6. c. .: and that a quit-rent of 42s. *per annum* was issuing out of the said tenements at the time of the will and statute, and paid to the king: and that the tenements devised at the time of the will, and until the said statute, were of the annual value of *gl. 4s.* and no more, yearly: that the lands were seised into the hands of king Edward the sixth, and by him granted away to *J. S.* under whom the defendant claims; and under the parson and churchwardens the plaintiff claims as lessee.

The sole question was, Whether these tenements were given by the said statute to the king? And it was resolved, that these lands were given to the king.

A freeman and citizen of London may, by the custom of the city devise lands in mortmain without licence. Ante, 248. PoR. 517. 576. S. C. Jones, 387. Priv. Lond. 156. Co. Lit. 21.

Lands devised to the parson and churchwardens of a parish, and that they shall pay 10l. a-year out of the profits to find a priest, and the residue to be employed in the repairs of the church, are given to the king by the statute against superstitious uses.

Ante, 249.

4. Co. 114. a.

2. Vern. 166.

Moor, 131. 264.

Latch. 38.

1. Roll Rep. 417.

5. Com. Dig.

"Uses," (M).

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

1. Bl. Com. 392.

GRIMSTON objected, that the land was not given for the maintenance of a priest, but only a certain sum of 6l. 13s. 4d. yearly; for the land being appointed for the reparation of the church with the residue of the profits thereof, it being a good use, shall save the land.

Yet THE COURT, after argument at the bar, held, that forasmuch as it was but the residue, *si quid fuerit*; which is uncertain, if any shall be or no; and it appears by the verdict, that the land was charged with a quit-rent of 42s. yearly, and the superstitious uses amounted to 7l. 6s. 8d.; and that at the time of the will, and until the statute, the land was valued but at 9l. 4s. yearly, and no more; and that the profits employed with the quit-rent appeared to amount to 9l. 8s. 8d. which was 4s. 8d. more than the land yearly yielded, and so no residue, therefore to be within the words and intent of the statute, that is to say, the first and third branch; and that the principal cause of this gift is the maintaining of a priest and an anniversary, and wherewith and whereby a priest and an anniversary were maintained (a). And although it hath been objected, there may be improvement expected of the houses, there being six houses, it was thereto answered, that it is not to be intended; for the value is to be regarded as it was at the time of the will making, at least as it was at the time of the making of the statute of 1. Edw. 6. c. . and a greater value shall not be expected; and if it were of a greater value after, it is not considerable; for it is to be respected as it was at the time of the statute made, as 6. Edw. 2. "Voucher," 258. 19. Hen. 6. pl. 46. vouchee shall not render in value more than it was at the time of the warranty; and the value of the land is to be respected as it is *ultra reprisas*. And the case of *Drake v. Hill*, adjudged 8. Car. 1. in the common pleas, was cited, that the eight pounds value of a church shall be according as it is valued in the valuation of the benefices, and not according to the true value as it is upon improvement, although diversity of opinions have been therein before; for the statute intends as it was valued in the ancient book of first-fruits and tenths, which was taxed 29. Edw. 1.; and after, when another valuation was made, 26. Hen. 8. then according to that valuation. Wherefore this land being charged with a quit-rent of 42s. the residue not amounting to the value appointed for the superstitious uses, it was adjudged for the defendant. *Vide* 23. Edw. 3. pl. 8. 27. Edw. 3. pl. 1. 7. Hen. 3. "Dower," 192.

(a) See for this 4. Co. 110. 112. Adams and Lambert's Case.

#### CASE 2.

#### Pew and his Wife against Jeffries.

"A Welsh jade," if understood in the language of the country to mean "Welsh jade," are words of spirit-

SUIT being in the spiritual court for calling the wife "Welsh jade and Welsh rogue," and sentence being there in the archbishop's court, the defendant appealed to the court of audience. The appeal mentioned the former words; and in the libel was interlined, "and a Welsh thief."

21. cognizance; but "Welsh thief" seems cognizable by the common law.

Hereupon





CLEVE  
against  
VEER.

JONES was of the same opinion, and cited the case of *Beamond v. Long* (a).

Also BERKLEY said, that as the verdict is found, the plaintiff ought not to have judgment; for it is an ejectment of the capital messuage, *five situm manerii de B.* and one hundred and twenty acres of land, one hundred of pasture, &c. in *B.*; which declaration is not good for the messuage because it is in the disjunctive, but it is good for the land, and there is no title found for the defendant for the land: for the verdict finds, that the said *Edward Dobbs*, the lessor and the conusor, was seised in tail of the manor of *B.* at the time of the recognizance, and that this manor was delivered in extent; but he doth not say that the land in the declaration was parcel of the said manor; and so it is not found that this land was delivered in extent, and then the defendant hath no title.

Cro. Eliz. 828. But JONES argued with ME, that this is not material; for being in a special verdict, it is intended, otherwise there would be no cause of a special verdict (b).

Ante, 22. 130.  
392.

Cro. Jac. 175.

So for the matter JONES and BERKLEY agreed, that judgment should be given for the plaintiff.

5. Com. Dig.  
170.

But I argued to the contrary, because this extent upon the statute is in nature of a *statute staple*, where all the proceedings are in chancery, and not like to executions upon statutes merchants, where the beginning is upon a certificate made in the chancery, and a *capias* is awarded returnable in the common pleas or king's bench; for there peradventure, as the case is 18. *Edw.* 3. 10. and *Dyer*, 180. where the conusee dies before execution, the executor shall not proceed in the execution, upon *non est inventus* returned, without a new writ out of the chancery, because it is their warrant to proceed in the common pleas; but an extent upon a statute staple, and the proceedings thereupon, are all in the chancery; and then, although the conusee dies betwixt the writ of extent and the return thereof, yet being but a preparation unto the execution upon his cognizance, what lands are extendable and the value of them, and to seize them into the king's hands *ut ei liberemus*, none hath answered to it; and it being returned there, it is in vain to have a new inquisition, it being all of record in the same court.

SECONDLY, Although the conusee dies before the term of the writ, there being a good inquisition, it is well enough: and although it be an inquisition after the death of the conusee, yet it is good enough; for the sheriff did that which the writ enjoined him, *viz.* to enquire what lands the recognizor had at the time of the recognizance acknowledged, or after, of what annual value, and to seize them into the king's hands *ut ei liberemus*, that is only to shew the king's intent; and the seizure into the king's hands makes not any title to the king, nor puts the possession in him, but it is only matter of form, as it is in 3. *Edw.* 6. 67. Although an inquisition be after the death of the conusee, yet it is as good as if it had been in his life; for the sheriff may not take notice of the

(a) Ante, 108. 227. (b) See for this point *Goodall's Case*, 5. Co. 97. 2.

Cleave  
against  
Venn.

death of the conusee, but he ought to return how he served the writ; and if he return that the conusee is dead, he shall be amerced, as 10. Hen. 4. pl. 5. & 7. and 32. Hen. 6. pl. 28. are: and there is a difference betwixt a judicial writ after judgment to do execution and a writ original; for the writ judicial to make execution shall not abate, nor is it abateable by the death of him who sues it; as it is the common course if a *capias ad satisfaciendum* or a *feri facias* upon judgment issued, the sheriff shall execute it although the party who sued it died before the return of the writ: and although the death be before or after the execution, if it be after the *teste* of the writ, it is well enough; as where a *capias ad satisfaciendum* is sued, and the party taken before or after the death of him who sued it, and before the day of the return; or if a *feri facias* be awarded, and the money levied by the sheriff, and the plaintiff dies before the day of the return of the writ, yet the executor or his administrator shall have the benefit, and is to have the money: and it is no return for the sheriff to say that the plaintiff is dead; and therefore he did not execute it.

And for the second point I argued, Because it is not a suit by way of action, as a *scire facias* or debt, which I agreed the administrator shall not have, upon a judgment obtained by the executor, because he comes *paramount* the executor (a); yet this being no suit, but the praying of a *liberate* upon the shewing of the letters of administration, the administrator may well have it; and he is the party who hath the privity to demand it, for the benefit of the intestate: and if the executor had had the extent well executed, and the *liberate* thereupon well delivered, and were in possession thereof, and died intestate, the administrator of the first man, in whose right the extent was sued, should have it, as JONES agreed afterwards in his argument; so where it is only to demand delivery, he may do it well enough.

But notwithstanding these reasons, JONES and BERKLEY appointed (BRAMPSTON, *Chief Justice*, being in the court of wards), that judgment should be entered for the plaintiff; for JONES said, that BRAMPSTON delivered to him his opinion for the plaintiff, because the extent taken after the death of the conusee, although it was returned in the chancery at the day of the return of the writ, was merely void; and so the defendant had not any title thereby. Wherefore judgment was entered accordingly for the plaintiff.

(a) Vide 1. Co. 96. and Brudnel's Case, 5. Co. 9.

## Webb against Nicholls.

CASE 4.

ERROR of a judgment in the common pleas, in an action on the case for words; where Nicholls declared, That he was an attorney in the common pleas, and so had been for fifteen years: and whereas one Humphry Stile had retained him for his attorney, to prosecute a suit against J. D.; that Webb, *præmissorum non ignarus*, intending to scandalize him in his profession, and to dissuade others from retaining him, having communication with the said Humphrey Stile, falsely and maliciously said of him, the said Nicholls, these words: An attempt to dissuade a client from employing an attorney by saying that he is a notorious knave, &c. is actionable. 1. Roll. Ab 52.



Webb  
against  
NICHOLLS.

words: "I marvel you will employ such a knave as *Nicholls* (*innuendo* the plaintiff); you will have but disgrace and discredit by "employing him: he (*innuendo* the plaintiff) is a proclaimed knave "in the market." *Quorum præmissorum prætextu*, he was much prejudiced in his profession, many of his clients withdrawing from him, &c. The defendant pleads not guilty: and found against him, and damages assessed to two hundred pounds.

Upon this judgment error brought and assigned, Because the words were not actionable; for he doth not say that the communication was with the said *Humphry Stile* of the said suit, nor is it shewn that the words were spoken of the employment in his profession; and therefore *HEATH, Serjeant*, moved, that an action lies not for these words: for to call an attorney "knave" is but a word of heat, and a word for which no action lies; and to say "he is a proclaimed "knave in the market," is but an aggravation of the word "knave." And this case differs from *Bychley's Case*, 4. Co. 16.: for there he saith of him, being an attorney, "You are known to be a corrupt man, "and to deal corruptly;" so as those words cannot have any other exposition than as touching his office of attorney; but it is not so here, &c.

Post. 516.  
Ante, 192.

But ALL THE COURT held, that the action well lies; for it is not intendable but that he spake of him as an evil dealer in his profession; for he speaking with him who used the said plaintiff in a suit, and speaking to him the words *ut supra*, they have relation to his profession, and cannot have other intendment; especially the plaintiff alledging that he spake them to scandalize him in his profession, and the defendant pleading not guilty thereunto, and being found guilty according as the plaintiff hath counted: wherefore the judgment was affirmed.

## CASE 5.

## Memorandum.

Trinity Term  
adjourned on  
account of the  
plague.

UPON *Saturday* before the end of the Term, the king caused his proclamation to be published the same day in chancery, that in regard of the increase of the pestilence in *London* and the places thereto adjoining, and the danger it might disperse into the country, he resolved to adjourn the Term from *Octab. Trin.* until *Tres Trin.* and that the said returns should be only for furtherance of the ordinary proceedings; and that no proceedings should be upon demurrers or special verdicts, nor any hearings in the star-chamber, or in any of the courts of equity.

## CASE 6.

## Stone against Newman.

Ante, Page 427.

In pleading an  
attainder of  
treason which  
is confirmed by  
special act of  
parliament, en-  
acting, That the  
forfeited lands shall  
be vested in the  
Crown without office  
found, it is not  
necessary to  
alledge a seisin in  
the king. Ante, 431.—3 Term Rep. 734.

THIS Case was now moved again upon exceptions to the pleading.

FIRST, Because there is not any seisin alledged in the queen; and then *Sir Francis Wyatt's* title is good until seisin; for he

had

had the first possession.—*Sed non allocatur*: for it appears, that after the attainder, the queen being intitled by the general act of parliament of 33. Hen. 8. c. 20. and by the special act of 1. and 2. Philip & Mary, c. 3. of the attainder of Sir Thomas Wyatt, it was in the queen without office; and that the queen granted it by patent to him, under whom the plaintiff claims, who entered, and was seised until Sir Francis Wyatt entered and distrained for *damage fasant*; so he had the priority of possession and right (as it was now held by the greater opinion); wherefore this exception was disallowed.

STONE  
against  
NEWMAN.

3. Term Rep.  
734.

THE SECOND EXCEPTION was, That the indictment was by virtue of a commission granted to divers persons, and he doth not say *sub magno sigillo Angliæ*; and that the attainder was upon the trial before the commissioners, and he doth not say *sub magno sigillo*, so that if it were not *sub magno sigillo* it is not good. And in proof thereof the pleading in the common pleas in *Moulton's Case* (a) was remembered, that the commission was *sub magno sigillo*; and in *Huntley's Case* (b) in this court, because the deprivation was found before the commissioners ecclesiastical *virtute commissionis* to them directed, and he doth not say *sub magno sigillo*, it was held to be ill; and in *Page's Case* (c) letters patents were pleaded *sub magno sigillo*. And although it be true, that in *Walsingham's Case* (d) it is pleaded as here, and doth not say *sub magno sigillo*, and yet judgment given, yet it was said, that was because no exception was taken thereto. And in *Co. Ent.* 174. the commission is pleaded by letters patent *sub magno sigillo*, and an attainder by virtue thereof; and in the case of *Sir Moyle Finch* (e) it was so likewise pleaded. So generally the pleading is *sub magno sigillo*; otherwise it is ill, and as no attainder pleaded.

JONES, Justice, at the first, was of that opinion; but afterward, upon search of precedents, whereby it appeared, that sometimes *sub magno sigillo* was omitted; and when it is shewn, *quod per literas patentes commissionis*, omitting *sub magno sigillo*, it is to be intended under THE GREAT SEAL, and not otherwise; ALL THE COURT agreed, that although it were the better course to shew that it was *sub magno sigillo*, yet being omitted, it is well enough, and good both ways.

AND THEY AGREED, that here, according to the greater opinion in the exchequer chamber, judgment should be entered for the plaintiff.

(a) Cro. Eliz. 151. 2. Leon. 211.

(c) 5. Co. 52. a.

Leon. 232.

(d) Plowd. 547.

(b) Palm. 517. 2. Brownl 14.

(e) Co. Ent. 194.

### Porter's Case.

CASE 7.

PORTER was indicted on the statute 1. Jac. 1. c. 11. For that she, being lawfully married to — Porter, and he then living, and she well knowing thereof, felonically espoused one Rooks, contra *statutum*. A wife separated *à mensâ et thoro* *causâ adulterii* or *vel fornicationis*, is within the exception of the 1. Jac. 1. c. 11. against bigamy, although the word *divorced* be not inserted in the statute.—1. Hale, 692. 3 Inst. 89. Sum. 121. Kely. 27. Co. Lit. 235. 2. Burn. E.L. 418. Com. Dig. 550, 551. 4. Com. Dig. 30. 1. Hawk. P.C. 174.

Upon

PORTER'S  
CASE.

Upon not guilty pleaded, a special verdict was found, that she was lawfully espoused to the said Porter; and that before SIR JOHN LAMB, Judge of the Court of Audience, she had sued a divorce from the said Porter *propter sevitiam*, where upon prosecution it was decreed, *quod propter sevitiam* of her said husband towards her, she should be separated *à mensâ et thoro* from her said husband, but no word of *divorciamus* was therein; and it was expressly intimated in the sentence, that she should not marry to any other during the life of the said Porter. And this sentence was found *in hæc verba*. And that afterwards, within six months, the said Porter living, and she knowing thereof, espoused the said Rooks. And if she be guilty of the felonious marrying of a second husband against the form of the statute, they prayed the discretion of the Court.

GERMYN, *for the king*, argued at the bar, that it is felony within the statute, for she is directly within the words of the body of the act, she being married to one man, and he being alive, and she, knowing thereof, marrying to another. And the proviso shall not aid her, for that doth not extend but only to persons which are divorced by sentence in the spiritual court: but here is not any sentence of divorce, but only a separation from her husband *à mensâ et thoro*, which is only a liberty to live from him, and a provision only for her safety, that she shall not live with him, to avoid his misusing of her by his cruelty; and there is not one word of *divorciamus* in the sentence, as there is in every case of divorce; therefore she is out of the proviso. And this is none of the divorces mentioned 47. *Edu.* 3. *folio ultimo*, where it is found, that there be but five divorces, viz.

(a) *Sed quæra.*

See the 2. &

3. *Edu.* 6 c. 23.

1. *Eliz.* c. 1.

and the marri-

age act, 26. *Geo.* 2. c. 33.

1. *causâ professionis*, 2. *causâ præcontractûs* (a), 3. *causâ consanguinitatis*, 4. *causâ affinitatis*, and 5. *causâ frigiditatis*; and this divorce is none of them, and the proviso doth not intend but when there is a sentence of an absolute divorce,

HOLBOURN and GRIMSTON, *for the defendant*, argued strongly to the contrary; for it is a penal law concerning life, and therefore ought to be favourably expounded *in favorem vitæ*, and that the proviso extends to this kind of divorce; for there be divorces *ex causâ precedente*, as in the cases of divorces cited, which be not properly divorces, but rather sentences of nullifying the marriage, which is not intended in the proviso, for such a marriage was void of itself; and by the sentence declaration is made that it was void *ab initio*; and so it is where marriage is *infra annos nubiles*; and such divorces are declared null, and by such divorce the parties are freed *à vinculo matrimonii*. But there be divorces *ex causâ subsequente*, as *causâ adulterii*, which, in the intention of some, is an absolute divorce, and that the party innocent might marry again; but others conceive that it is no absolute divorce, but only a separation *à mensâ et thoro*, and frees the parties from the performance of conjugal duties only the one with the other. For although in former times it was questioned whether such parties divorced might marry again, yet now it is made clear by the canons that they may not; and to avoid this question principally, this proviso was added in the statute, that where sentence of divorce is given, such persons marrying shall not be in danger to be felons by this statute. By the same reason in this case there being a sentence



a sentence of divorce, although it doth not dissolve parties *à vinculo matrimonii*, yet an ignorant woman cannot know that distinction, but they conceive, when there is a sentence of divorce, that they are out of the statute. And although there be no such word as *divorciamus* in the sentence, yet there is *separamus*, and the word *divorciamus* is not usual, but *separamus*. And *Co. Lit.* 235. shews what divorces be *à vinculo matrimonii*, which are the divorces before cited in 47. *Edu.* 3. pl. 37. which are causes precedent the marriage: and by such divorces the issue is made a bastard, and thereby declared, that they were not *justæ nuptiæ*. But divorce *causâ adulterii* is no dissolution *à vinculo*, but only *à mensâ et thoro*, and therefore the coverture continues betwixt them. And to that purpose the case was cited of *Stevens v. Totty* (a), where the husband, after such divorce *causâ adulterii*, released an obligation made to his wife before the coverture, and it was adjudged a good release, which proves that the marriage continues: and one *Stowel's Case* (b), that the wife, after such divorce, should have dower of her husband's land, which proves that the espousals continue betwixt them. But a divorce *causâ sævitæ* is grounded *ex jure nature*, and is in the same manner and nature as a divorce *causâ adulterii*; and the proviso in the statute is, that the parties divorced by sentence, if he takes another wife, or the wife takes another husband, shall not be within the danger of the statute. And this extends to every manner of sentence of divorce, and not to any particular cause of divorce; and so concluded, that she is within the proviso of the said statute, and so not guilty of the felony.

But THE COURT much doubted whether she were within that proviso; and if this should be suffered, many would be divorced upon such pretence, and instantly marry again, whereby many inconveniences would ensue. Whereupon she was advised not to insist upon the law, but to procure a pardon to avoid the danger; for it was clearly agreed by all the civilians and others, that this second marriage was unlawful, and that she might be in danger to be adjudged a felon by this statute.

(a) *Cro. Eliz.* 908. Easter Term, 44. *Eliz.* Roll 292.

(b) *Noy*, 108. *Godb.* 145. *Trin. Term* 2. *Jac.* 1. Roll 815.

*Moor*, 665.  
*Noy*, 45.  
*Co. Lit.* 235. a.  
*Cro. Eliz.* 908.  
*1. Salk.* 115.  
*3. Mod.* 71.  
*Powell on Contracts*, 202.

3. *Inst.* 29.

## Trinity Term,

12. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

### CASE 1.

### Anonymous.

BARON and *feme executrix* recover in debt. The *feme* dies before execution. The baron cannot have a *scire facias* on the judgment, for it is *in autre droit*. But if he has obtained judgment upon the return of the *scire feci*, it is good till reversed.

*Sed quare*, if a writ of error will lie to reverse it? (a) Ante, 208. 227. 286.

Co. Lit. 351. Jones, 248. 386. 1. Roll. Ab. 389. Cro. Eliz. 730. 5. Mod. 230. 1. Salk. 263. 5. Com. Dig. 288.

2. Bac. Ab. 212. 1. Cromp. Prac. 343.

5. Co. 121. Cro. Eliz. 108. 754.

2. Hale, 169.

2. Hawk. P. C. 328, 339; and see the case of Rex v. Fieldhouse, Cowp. 325.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

Roll.

**SCIRE FACIAS.** Upon a judgment given in debt for husband and wife as *administratrix* to her first husband, the wife being dead after judgment, and before execution, the husband brought a *scire facias*, and upon the *scire feci* returned obtained a judgment by *nihil dicit*.

This being a judgment of the last Term, ROLLE now moved to stay execution; for the debt being due to the wife as *administratrix*, although the recovery be by the husband and wife, she being dead, the husband may not have execution upon this judgment, for the debt was due to the wife *in autre droit*.

And ALL THE COURT was of this opinion, that the *scire facias* ought not to be brought by the husband; but being sued, and judgment obtained thereupon the last Term, although the judgment be erroneous, yet it ought to stand until it be reversed by error.

But, Whether he may have a writ of error in the exchequer chamber, *tam in redditione judicii quam in redditione executionis*? JONES and BERKLEY doubted; for upon a judgment in a *scire facias* in this court there lies no writ of error in the exchequer chamber.

But I held, forasmuch as this *scire facias* is but to have execution grounded upon a former judgment, it is within the 37. Eliz. c. 1. and that a writ of error lies in the exchequer chamber to reverse the judgment and the execution; and although there be no error upon the judgment, but that it be affirmed, yet the execution may be reversed. But BRAMPSTON, *Chief Justice*, doubted thereof; *ideo CURIA advisare vult*.

(a) Vide 17. Car. 2. c. 8. which gives and by 29. Car. 2. c. 3. the husband shall *scire facias* to an administrator *de bonis non*; have administration.

### CASE 2.

### Cholmley's Case.

An indictment against two that they *insultum fecerunt*, is good, although the grand jury find *Ignoramus* as to one of them.

5. Co. 121. Cro. Eliz. 108. 754.

2. Hale, 169.

2. Hawk. P. C. 328, 339; and see the case of Rex v. Fieldhouse, Cowp. 325.

Roll.

Roll.

**INDICTMENT** against Jasper Cholmley and John Cholmley, of Hoxton, in the county of Middlesex, gentlemen, For that they *insultum fecerunt* upon JOHN HIGHAM, Doctor of Physic, in ecclesiastical de SHOREDITCH *prædictâ*; et *prædicti*. JOH. HIGHAM, ad tunc *et ibidem*, in ecclesiâ de SHOREDITCH *prædictâ*. *verberaverunt, vulneraverunt, et male tractaverunt, contra formam statuti, &c.*

The grand jury find BILLA VERA as to Jasper Cholmley, and *Ignoramus* for John Cholmley. And hereupon he appeared, and pleaded not guilty; and it was found against him.

2. Hawk. P. C. 328, 339; and see the case of Rex v. Fieldhouse, Cowp. 325.

Roll.

Roll.

Roll.

ROLLE now moved in arrest of judgment, that the indictment was not good, being *fecerunt*, whereas it is found only *billa vera* against one.—*Sed non allocatur*; because it was exhibited against two, and it is but false *Latin*.

CHOLMLEY'S CASE.

SECONDLY, Because the indictment is *contra formam statuti*; An indictment and this offence is not punishable by the statute, unless that he concluding *con. for. stat.* for an offence not punishable by the common law, is bad, if there is no statute to support it. smote with a weapon, or drew a weapon in the church or church-yard, or drew a weapon to that intent, which is not mentioned in the indictment: and by the second clause in the statute, for smiting or laying violent hands, it is excommunication *ipso facto*; and it is not mentioned here how he struck.—And thereof the JUSTICES doubted.

Cro. Eliz. 231. 2. Leon. 10. 5. Co. 99. 2. Roll. Rep. 263. 2. Roll. Ab. 82. 6. Mod. 17. 2. Hale, 170. 2. Hawk. 356.

JONES, Justice, said, that the indictment was good for battery at the common law, But ALL THE OTHER JUSTICES were against him therein; for the indictment concluding *contra formam statuti*, it cannot be good, as for an offence at the common law. An indictment for battery concluding *con. for. stat.* is bad.

2. Hale, P. C. 192. 2. Hawk. P. C. 358.

But afterwards another exception was taken by GRIMSTON, Because the offence was alledged to be done in the church of *Shoreditch* *aforsaid*, and *Shoreditch* was not named before; and upon view of the indictment it appearing to be so,—ALL THE COURT held, that the indictment was void: and for this cause the judgment was stayed. An indictment for an assault at *A. aforsaid* is bad, if no place be previously mentioned.

Post. 504.

### Smith's Case.

CASE 3.

MARY SMITH and Others were indicted upon the 4. & 5. Philip & Mary, c. 8. in the county of *Middlesex*, before the justices of the king's bench, Because they took and conveyed away *Frances* the daughter of *Scipio Squire*, being under the age of sixteen years, unmarried, and in the custody and under the government of her said father, without his consent, *et contra formam dicti statuti*.—And upon this *Mary Smith* pleaded not guilty, and was found guilty. *Qu.* If the king's bench has jurisdiction over the offence of stealing an heiress?

It was moved in arrest of judgment, that the indictment in this court was not good, being *coram non iudice*; because the statute appoints, that for this offence the party offending shall be punished by two years imprisonment, or shall pay such a fine as the star chamber shall appoint. The words in the statute are, that "the counsel in the star chamber, and the justices of assise, by inquisition or indictment shall have power to hear and determine, &c." And the question was, Whether this may extend to justices of the king's bench to give them authority to inquire, or only to justices of assise? and, Whether justices of the king's bench be not justices of assise?

But of this THE COURT doubted, because there be no justices of assise for the county of *Middlesex*.

THE SECOND QUESTION was, Admitting they may hear and determine, Whether they may impose any fine, or only give judgment for the imprisonment, because the fine is appointed to be assessed in the star chamber, and in no other place? *Quare (a)*.

(a) It is determined, that the

king's bench has jurisdiction over this offence. 2. Lev. 172. 179. 3. Keb. 708. 715. 4. Mod. 154. Sid. 362. 2. Mod. 128. 2. Hawk. P. C. 9.

Memorandum:



## CASE 4.

## Memorandum.

TRINITY TERM postponed by writs of adjournment, according to a former proclamation, on account of the increase of the plague.

IN regard of the increasing of the pestilence in *London* and the places adjoining, THE KING, according to his proclamation formerly made, directed his writs of adjournment to the king's bench, common pleas, and the exchequer, to adjourn the Term from *Octabis Trinitatis* to *Tres Trinitatis*. And upon the same day of *Octabis* all the Courts sat until eleven of the clock in the forenoon, and heard motions concerning matters in arrest of judgment, and pleadings, and indictments, and writs of error, where it appeared that the writs of error were brought for delays of execution, and no colour of error; but no judgments in any demurrer, or matter in law upon special verdict, unless it were in cases which were moved the last Term; and rule given, that if cause were not shewn the first or second day of this Term, judgment should be entered for the plaintiff or defendant, as the case required: there, upon motion, although it were upon demurrer, or special verdict, no cause being shewn to the contrary, the Court gave judgment according to the former rule; and so JUSTICE HUTTON said they did in the common pleas.

If gaolers permit their prisoners to go at large under colour of a *habeas corpus*, it is an escape; but upon necessity they may, by rule of Court, keep them, *sub salvâ et arctâ custodiâ*, anywhere out of the prison.

Ante, 14. and 210.

Hutton, 122.

1. Roll. Ab. 808.

110b. 202.

Moor, 297.

3. Co. 43.

Noy, 38.

Hard. 476.

Comyns, 422.

354.

3. Keb. 305.

1. Mod. 116.

10. Mod. 79.

12. Mod. 31.

227. 583.

Ld. Raym. 241.

783.

And afterward, upon the same day, BRAMPSTON, *Chief Justice*, published, "That whereas the prisoners of the King's Bench and Fleet had several times petitioned the king, for avoiding the danger of the infection of the plague much increasing, that they who could give sufficient security to the Marshal or to the Warden of the Fleet to be true prisoners, and to return to prison at the days to them prescribed, might go at large by *habeas corpus* for that time (as they pretended was the ancient course in former times upon the like cases)"—ALL THE JUSTICES AND BARONS of the exchequer, except LORD FINCH, *Chief Justice* of the common pleas, and BARON DENHAM, (who were not in town), being assembled at the LORD KEEPER's house to consult of this matter, and what course was to be taken for the safeguard of the prisoners, upon conference with the Lord Keeper, resolved, That a *habeas corpus* was an ancient and legal writ; but under colour thereof the Warden of the Fleet and Marshal of the King's Bench ought not to suffer prisoners to go at large, but that such permission is an abuse of the said writ, and an escape in the keeper of the prison: but for the safeguard of the prisoners (who might, if they would, provide for themselves by payment of their debts, and be discharged), the Warden of the Fleet, by rule or licence of the Courts to which they are subject, and the Marshal of the King's Bench, by rule from the King's Bench, may keep their prisoners in any other place in the country to be assigned by the Courts to them (a); but there they ought to be kept as prisoners, *sub salvâ et arctâ custodiâ*, as they ought to be in their proper prisons. And this resolution was delivered to the king under all their hands; and the king signified his pleasure that he very well approved thereof, and commanded that it should be observed. And it was remembered, that in *primis Caroli*, when the Term was at Reading, such resolutions were by all the Justices.

And afterward, about eleven of the clock the same day, the writ of adjournment was opened, and openly read; and the Term was adjourned until *Tres Trinitatis*.

(a) See 3 Term Rep. 583, 584. respecting the extent of the rules of the prison, and the restrictions under which day rules are now to be granted.

NOTE,

NOTE, That neither chancery, the exchequer chamber, nor the duchy court, did sit all this Term.

Stone *against* Lingar and Others.

CASE 5.

**ACTION ON THE CASE.** Whereas the plaintiffs were inhabitants and possessed of such lands for years in the parish of *St. Martin's*, and were there liable to the payment of all duties for the reparation of the church of the said parish, and to all taxes and charges within the same; that the defendant, being **CONSTABLE** of *Roxborough*, falsely presented that they were inhabitants in the parish of *Roxborough*, and possessed of the said lands in the parish of *Roxborough*, and chargeable there to the payment of such duties; by reason whereof they were compelled to pay such sums unduly, for which they brought this action.

A constable acquitted on an action on the case for a false presentment is not entitled to double costs under  
7. Jac. 1. c. 5. Ante, 175. 285.  
2. Lev. 251.  
1. Show. 215.  
2. Vent. 45.  
Carth. 189.  
B. R. H. 115.  
2. Com Dig. 557.

Upon not guilty pleaded, the defendant was found not guilty.

And **GRIMSTON** moved for the defendant to have double costs, because what he did was by virtue of his office, and by the statute of 7. Jac. 1. c. 5. he ought to have double costs.

**ATKINS**, on the other side, moved, that this being a special action on the case for false presentment (and not an action of trespass or false imprisonment), wherein liberty is given to plead "*not guilty*" and give the special matter in evidence; and the question being, In what parish the said lands were? that it was out of that statute, but within the statute of 23. Hen. 8. c. 15. which gives single costs to the defendant.

ALL THE COURT were of this opinion, and gave rule accordingly.

Easter

REIGN OF KING CHARLES THE FIRST

IN THE YEAR 1649

BY JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

1704

Price 1s. 6d.

For the Right of the Copy, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

1704

Price 1s. 6d.

For the Right of the Copy, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

1704

Price 1s. 6d.

For the Right of the Copy, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

1704

Price 1s. 6d.

For the Right of the Copy, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

1704

Price 1s. 6d.

For the Right of the Copy, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

A  
good  
valu  
his  
am  
defe  
nion  
"a  
and  
N  
altie  
B  
the  
con  
difi  
dun  
Vau  
giv  
bad  
plain  
near  
ta  
the  
calc  
(4)  
give



## Easter Term,

13. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*} *Justices.*Sir John Banks, *Knt. Attorney General.*Sir Edward Littleton, *Knt. Solicitor General.*Humphrys *against* Stanfeild.

CASE II:

**ACTION FOR WORDS.** Whereas the plaintiff being son and heir-apparent to *John* his father, who was possessed of goods to the value of two hundred pounds, and seised of lands to the value of forty pounds *per annum*; and whereas *William Humphrys*, his uncle, was seised in fee of lands of the value of forty pounds *per annum*, and he the plaintiff was in likelihood to be his heir; that the defendant, to disgrace the plaintiff, and to make others have an ill opinion of him, said maliciously and falsely of the plaintiff, "Thou art a bastard." Upon not guilty pleaded, and found for the plaintiff, and damages assessed to forty pounds.

An action will lie for saying of an heir "Thou art a bastard," without proving special damage.

Jones, 388.  
1. Roll. Ab. 38.

MAYNARD moved in arrest of judgment, that these words are not actionable, because he doth not shew any particular damage.

But ALL THE COURT held, that the action lies; for by reason of these words he may be in disgrace with his father and uncle, and they conceiving a jealousy of him touching the same, it is possible they may disinherit him; and although they do not, yet the action lies for the damages which may ensue.—And JONES cited, that in the exchequer *Vaughan* brought an action against *Ellis* (a), surmising, that land was given to the plaintiff's grandfather, and to the heirs males of his body; and that he had issue the plaintiff's father, who had issue the plaintiff and divers other sons then living, who by possibility might be heir to that intail: that the defendant said of him, "Thou art a bastard," whereupon he brought his action; and it was adjudged maintainable, and this judgment affirmed in a writ of error. And another case was cited to be so resolved in this court, of *Banister v. Banister* (b).—ALL THE COURT was of this opinion. Wherefore rule was given, that judgment should be entered for the plaintiff, unless, &c.

(a) Cio. Jac. 213.

(b) Jones, 388.

## CASE 2.

## William Slater's Case.

An original order of bastardy made by the sessions cannot be vacated by justices of assize, or annulled by a subsequent order made by the two next justices.

2 Bulst. 349.  
555.

1. Vent. 310.

1. Com. Dig.  
585.

3. Burr. 1679.

See Mr. Const's  
edition of Bott's  
Poor Laws,

vol. i. page 443.  
3 Term Rep.  
496.

**W**ILLIAM SLATER was, by *Elizabeth Eaton*, charged with the getting of a bastard-child on her body.

The two next justices did not make any order in it, according to the 18. *Eliz.* c. 3.; but the cause came first to be originally heard at the general sessions of the peace at *Spalding*, in the county of *Lincoln*, 13. July, 8. Car. 1. where the justices ordered, that "WHEREAS it was proved by witnesses, that one *Alexander Leigh* had often used private company with the said *Elizabeth Eaton*, and had confessed that he had done as much to her as a man could do to a woman; and that she had said, that *Leigh* had the use of her body, and that she feared she was with child by him; THAT thereupon *Slater* should be discharged of the child, and she be committed to the house of correction during her life (a); and that *Alexander Leigh*, the reputed father, should pay from the birth of the child, to the churchwardens of *Pinchback*, weekly fourteen-pence towards its maintenance, until the age of fourteen years, and the overseers then to take the child."

Afterwards, 1st August, 12. Car. 1. at the assizes at *Lincoln*, upon complaint of the inhabitants of *Pinchback* to the Judges, they ordered, "That two of the next justices to the parish where the child was born (naming them) should take consideration thereof, according to the statute, and settle such course therein as to justice appertained."

Whereupon those two justices 1st March, 12. Car. 1. declared "the said *William Slater* to be the reputed father, and that he should pay (the child being five years old, and all that time having been maintained at the parish charge) at one payment 18l. to the overseers of the said parish, and 14d. weekly till the child came to fourteen years of age, and to give his bond of fifty pounds for performance thereof."

SLATER refusing to pay or give bond, the said justices of peace committed him (b); whereupon he sued out a *certiorari* to remove the proceedings into this court; who appearing upon an *habeas corpus* and upon reading of the return, and hearing counsel on both sides GRIMSTON being of counsel for Slater, these points were resolved by the whole Court:

By 18. *Eliz.*

c. 3. an order of  
bastardy could  
only be made by  
two justices.

FIRST, That before the 3. Car. 1. c. 4. the justices at the sessions had no authority to meddle in the case of bastardy, till the two next justices, according to the 18. *Eliz.* c. 3. had made an order therein; and that then, and not before (the party refusing to perform the order upon his appeal giving reasonable security to appear at the next sessions, and abide such order as the justices there, or the more part of them, should make, &c.), the justices at the sessions might make new order, &c. otherwise not.

But by 3. Car. 1.  
c. 4. the sessions  
have an original  
jurisdiction in  
case of bastardy.

SECONDLY, That by the statute of 3. Car. 1. c. 4. the justices of the sessions have power and authority originally to make an order in the case of bastardy; for the words of the statute are, viz. "That all justices of the peace within their several limits

(a) See 7. Jac. 1. c. 4. 13. & 14. Car. 2. c. 1. s. 19. 6. Geo. 1. c. 19. and 6. 2. Mod. 4. B. R. H. 112. 160.  
Geo. 2. c. 31.

"precincts, and in their several sessions, may do and execute all things concerning that part of the statute touching bastards begotten out of lawful matrimony, that by justices of the peace in the several counties are by the said statute limited to be done." And therefore the first order made by the sessions was in this case good and legal, and the second order made by the two next justices void, and could not alter or revoke the order which was first made by good authority; and for proof thereof one *Pridgeon's Case*, ante, 341. & 350. was cited (a).

SLATER'S CASE.

Jones, 330. Stra. 475. 503. B. R. H. 79 301. 1. Vent. 310 — See vide 1. Mod. 480. 1. Vent. 48.

(a) 2. Bulst. 343. 355. 20. Salk. 473.

THIRDLY, it was objected, That the commitment of *Elizabeth Eaton* for life, for her first offence, was more than the justices had authority to do, and therefore the order void. But it was resolved, that an error in part, and in that part of the order which only concerned her, should not vitiate the whole order (b).

An order of sessions is not void by being bad in part.

(b) By 5. Geo. 2 c. 19. the sessions may amend defect of form.

Goodier against Platt.

CASE 3.

Hilary Term, 11. Car. 1. Roll 349.

ERROR of a judgment in the common pleas, in *formedon*. The judgment was upon verdict, *quod recuperet seisinam de uno messuagio et duabus acris terræ et pasturæ*, not mentioning severally the quantity of the land, nor the quantity of the pasture; which being ill for the incertainty, it was moved, that the judgment might be affirmed for the messuage, which is certain as to that.

The Anecdote for meadow and pasture, without mentioning the quantity of each kind, is bad.

Vide post. 573.

Cro. Jac. 290. 1. Roll. 779. Ley 82. Cowp. 347. Dougl. 305. 1. Term Rep. 11.

BUT IT WAS HELD, that though the common pleas might have given judgment for the messuage only, yet when they have given an entire judgment for the messuage and land, this being ill in part, ought to be reversed for the whole, and cannot be affirmed for part, and reversed for the residue.

If a judgment be erroneous in one part, it shall be reversed for the whole. 1. Lev. 213.

1. Roll. Rep. 2. 1. Roll. Ab. 775. 1. Salk. 24. 5. Com. Dig. 303.

Turner against Lee.

CASE 4.

REPLEVIN. The defendant avows as executor for the arrears of a rent-charge granted to the testator for divers years, if he lived so long. The plaintiff takes issue, *quod non concessit*; and found for the avowant.

On the death of a grantee of a rent for years, if he should live; his executor or administrator cannot distrain for arrears either by the common law, or 32. Hen. 8. c. 37.

And after verdict it was moved in arrest of judgment by *ROLLE*, that this avowry was not good, because the rent granted for years being determined, the executor cannot, by the statute of 32. Hen. 8. c. 37. distrain; for that statute extends to those who have rent for life or inheritance.

Co. Lit. 162. Cro. Eliz. 372. Dyer, 375. 4. Co. 49. 7. Co. 39.

BUT *HENDEN, Serjeant*, said, that it is within the equity of the statute, because the estate is determinable upon a life; and if it were good, yet being admitted, and the issue being upon the grant, and found, it is good enough.

Latw. 1230. 18. Viners Abr. 542. Vaugh. 40. 2. Espin, Dig. 22.

H 2

But



TURNER  
against  
LEE.

But ALL THE COURT resolved, that it is not within the statute, for that provides remedy where the testator died seised of a rent to him and his heirs, or for life, and by his death there was not any remedy for the executor, as it appears by the preamble of that statute; but where he hath remedy by the common law by action of debt, as in this case the executor hath, he cannot distrain; and although the issue is upon a *non concessit*, and it is found *quod concessit*, yet it being an ill avowry in substance, judgment shall be given against him (a).

(a) See the Case of Hoole v. Bell, Ld. Raym. 173. where it is determined, that the 32. Hen. 8 c. 37. is a remedial law, and shall extend to all tenants for life; that the law has been so taken always since the statute; that the words of the statute are general enough to extend to all; that they seem to be admitted in the

case of Lambert v. Austin, Cro. Eliz. 332. and therefore the rule laid down in the present case of Turner v. Lee, so generally taken, cannot be law. See also Mr. Hargrave's note 4. Co. Litt. 162. a. and note 1. Co. Litt. 162. b. and 8. An. c. 14.

## CASE 5.

## Anonymous.

To say of a trader that he is "a beggarly fellow, and not able to pay his debts," is tantamount to calling him a bankrupt.

Ante, 31. — 1. Roll. Ab. 61. 1. Sid. 424. 1. Lev. 276. Carth. 330. Raym. 184. Stra 762. Ld. Raym. 1480. 1. Com. Dig. 183.

**A**CTION FOR WORDS. Whereas the plaintiff was a grocer, and lived by his trade of buying and selling; that the defendant, to scandalize him, said of the plaintiff, "He is a beggarly fellow, and not able to pay his debts." Upon not guilty pleaded, and found for the plaintiff, Rolfe moved, that these words were not actionable.—But ALL THE COURT against him, that the action lies; for these words tantamount as if he had said he had been a bankrupt.

## CASE 6.

## Snape against Turton.

If tenant for life, with a power appendant, make a lease for years, it is no suspension of the power as to the fee.

W. Jones, 392. Co. Lit. 237. 6. Co. 32. 2. Roll. Abr. 263. 701. Hob. 348. 9. Co. 107. Pow. on Pow. 17. 112. 5. Com. Dig. 632. 633. 1. Term Rep. 705.

**U**PON a special verdict it appeared, that Arthur Robfart, 15. Eliz. made a conveyance to divers uses, viz. to the use of himself for life, with divers remainders over, with a proviso, that if he made a conveyance of the premises in fee or fee-tail, that it should be good, and a revocation of the former uses; and it was found, that he made a lease for years, and the next day granted the reversion in fee to which the lessee attorned (b).—Whereupon IT WAS RESOLVED, that although there be not one intire estate in fee conveyed, yet both being found, and that it was with an intent to make a fee to pass, that this was a revocation within the proviso.

(b) See 4. and 5. Ann. c. 16. and 11. Geo. 2. c. 19. by which both the necessity and efficacy of attornments have been almost totally taken away.

Trin

# Trinity Term,

473

13 Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

Blague against Gold.

CASE I.

Hilary Term, 12. Car. 1. Roll 752.

*Ante*, Page 447.

THIS case was now argued again by ROBERT HYDE for the plaintiff, and by CHARLES JONES for the defendant; and the case was cited as before, but only this clause added, which was in the will, viz. "upon condition that the same be new built, according to the covenants betwixt me and Bernard Calvert." And it was found, that this house was the house in question, and was, at the time of the will-making, in the tenure of Hitchcock, and that the corner house was in the tenure of Wilson and Nott; and that the covenants with Bernard Calvert were for the re-edifying of the said corner house: *ad si super totam, &c.*—And this being now argued, JONES, BERKLEY; and MYSELF (*absente* BRAMPSTON), delivered our opinions *separatim*, that the corner house only passed by the will, and not the house adjoining in the tenure of Hitchcock; for although the corner house was not in the tenure of Hitchcock, but a misprision, yet the devise is good, for it is sufficiently ascertained before, viz. the corner house in Andover. And the addition in *tenura* HITCHCOCK, although it be not in his tenure and is a mistake, yet it is, but surplusage, and, although false, shall not vitiate the devise, because the devise was of a thing certain at the first, and shall be expounded according as the intent of the parties is apparent; and it is the stronger here by reason of the covenant to re-edify the corner house, and not the other (*b*). Wherefore it was adjudged for the plaintiff.

If a man has a corner house in the tenure of A. and another house adjoining it in the possession of B. and he devises his corner house in the possession of A. and B. the corner house only shall pass. *Ante*, 447.

1. Roll. Ab 34.  
Cro. Jac. 22.  
3 Co. 10.  
Hob. 171.  
Jones, 379.  
Powel on Dev. 416.  
Cowp 363/657.  
808.  
Doug. 760.  
1. Ter. Rep. 493.  
(b) *Pide* Dyer, 376 Cotton's Case, and

*ibid.* 172. 2. *Else*. 4. fol. ultimo. 2 Co. Dodington's Case, fol. 32. Plowd. Wrothsfley and Adams's Case.

Evans and Finch's Case.

CASE 2

EVANS and FINCH were arraigned at the gaol delivery of *Newgate*, For that they, about twelve of the clock in the forenoon, broke open *domum mansionalem* HUGONIS AUDLEY in the Inner Temple, no person being in the said house, and stole from thence forty pounds.

Upon the evidence it appeared, that the said Evans, by a ladder, climbed to the upper window of the said Hugh Audley's chamber, and took out thereof the said forty pounds; and that the said Finch stood upon the ladder in the view of the said Evans, and saw Evans in the chamber, and was assisting and helping to the committing of the said robbery, and took part of the money.

An abettor of a robbery on 39 Eliz. c. 13. if he do not actually enter the house, is not within the statute though he sees the principal take the money. 1. Jones, 394. 3. Inst. 65.

And

EVANS and  
FINCH'S CASE.

And all this matter being found, IT WAS ADJUDGED, Because the said *Finch* did not enter into the chamber, that he was not within the statute of 39. *Eliz.* c. 15. which takes away clergy where a house is broke open, and the robbery is above the value of five shillings, no person being therein, and that he should have his clergy, which was allowed him (a).

(a) The reason

of the difference is, because clergy is taken away only from the person taking, and not from the offence. 2. *Ld. Ray.* 847. See also 3. *Inst.* 65. 11. *Co.* 37. *Ld. Chief B. Parker's MSS.* 1. *Hale*, 521. § 7. 566. 2. *Hale*, 358. *Sum* 83. 237. *Kely*, 27. 52. *Foster*, 357 and 2. *Hawkins Pleas of the Crown*, ch. 33. f. 98. who doubts the propriety of this decision; but the question is now settled by the 3. & 4. *Will. & Mary*, c. 9. which excludes clergy from all aiders &c. in such cases. See 4. *Burr.* 2076.

Chambers in the inns of court and chancery are the mansion-houses of their respective inhabitants.

3. *Inst.* 65.  
2. *Hale*, 358.  
*Jones*, 394.  
*Cowp.* 5.  
Cases in *Crown Law*, 2. edit. page 84. 205. 249.

To oust an offender of clergy under the 39. *Eliz.* c. 5. there must be a breaking of some part of the house.

(b) 2. *Hale*, 357.  
*Foster*, 108.  
2 *Hawk.* ch. 33. and 88.

And as for *Evans*, the special verdict found, that it was in the chamber of *Hugh Audley* in the *Inner Temple*, and that the robbery was committed betwixt twelve and one of the clock in the day-time, no person being within the chamber at the time of the breaking thereof, but that divers persons were in the *Inner Temple Hall* and in other places of the house; and whether this be a breaking open the house and taking of goods above the value of five shillings, no person being within the house, and within the said act of 39. *Eliz.* c. 15. they prayed the discretion of the Court.—And, FIRST, IT WAS RESOLVED, that a chamber of any inns of court or chancery broken open may be said to be *domus mansionalis* of him who is owner of the said chamber; whereof at first I doubted, until I was informed that divers precedents were for burglary in breaking open such chambers.

SECONDLY, IT WAS RESOLVED, upon this special verdict (being removed by *certiorari* into the king's bench, and the prisoner removed by *habeas corpus*, and this breaking (b) open the chamber and taking forty pounds out thereof, no person being therein, although there were divers persons in other parts of the house (c), was within the statute of 39. *Eliz.* c. 15. which takes away clergy from such offenders. Whereupon clergy was denied to the said *Evans*, and judgment given in the king's bench, that he should be hanged.

(c) *Kely*. 27. 52. 2. *Hawk.* Ch. 33. f. 97.

### CASE 3.

### Ceely against Hopkins and his Wife.

How far words imputing witchcraft were actionable before the repeal of the 1. *Jac.* 1. c. 12. making witchcraft felony.  
*Ante*, 324.

**ACTION FOR WORDS.** Whereas the wife, *dum sola fuit*, spake of the plaintiff these words, "He is a witch, and a strong witch, and hath bewitched me and my aunt *A. S.*" (the aunt of the said wife *innuendo*) "therefore I will not marry him."

The defendant pleaded "not guilty;" and it was found against her, and damages given to forty pounds.

*GERMYN, Serjeant*, moved in arrest of judgment, that these words are not actionable; for to call one witch generally is not actionable, as it was adjudged in this court in *George v. Harvey* (a), and in another case, *Hawkes v. Ange* (b); and for the latter words, it is not said that he did them any bodily harm, and his bewitching without doing some bodily harm to the person or cattle is not punishable by the 1. *Jac.* 1. c. 12. (c); so whe he is not endan-

(a) *Ante*, 324.  
(b) *Cro. Jac.* 351.

(c) Repealed by 9. *Geo.* 3. c. 3.  
1. *Hawk.* P. C. p. 9.



gered by such words, there is no cause of action at the common law.

And ALL THE COURT held, that for the first words, "Thou art a witch, and a strong witch," no action lies, for they are too general: but to say, "You have bewitched me and my aunt," BRAMPSTON, JONES, and BERKLEY held, that the action lies; for it shall be intended he bewitched them in their persons: and although it be not shewn that any bodily wrong or harm was done to them by this witchcraft, yet it is an offence punishable by the statute, which doth not mention bodily harm to the person of any; but generally, if he bewitch any person, it shall be an offence punishable by the statute.

But I much doubted thereof; for words shall be always taken in *mitiori sensu*, and not in an ill sense if they may have any reasonable intendment: and here it may be that he bewitched them with fair words, as the common saying is; and the words subsequent maintain that intent, "therefore I will not marry him."

But the other Justices said, that they would not so intend it; but he ought to have pleaded specially to have extenuated it, if he would have it to be so intended. But they would further advise (a).

ment given for the plaintiff.

CREEK  
against  
HOPKINS and  
his Wife.

(a) It was moved  
again, and judg-  
Post. 480.

Dodson against Lynn.

CASE 4.

Trinity Term, 11. Car. 1. Roll 446.

EJECTMENT of a lease of an house and lands in *Molefworth* for three years. Upon not guilty pleaded, and special verdict, the case was, *Edward Lynn*, the defendant, being parson of *Molefworth*, the land in the declaration being found to be parcel of the glebe of the rectory, and that the said rectory is a benefice with cure over the value of eight pounds a-year; it was found, that he was chaplain to the *Earl of Salisbury*, and obtained licence from the *Archbishop of Canterbury* to accept of another benefice *modo sit infra* ten miles of the former, which was confirmed under the great seal. — *Lynn* accepts another benefice with cure, which was found to be distant seventeen miles from the first, and was instituted and inducted thereto, both being within the diocese of *Lincoln*; and that the archbishop made his visitation within the diocese of *Lincoln*, and inhibited the *Bishop of Lincoln* to execute any jurisdiction during his visitation; and that the patron omitted to present to the first benefice within the six months; and that the *Bishop of Lincoln* within the second six months collated the lessor of the plaintiff to the first benefice, who was admitted, instituted, and inducted thereto, and made the lease.

The question was, Whether the plaintiff hath good title against the defendant? The principal doubts herein were,

FIRST, Whether "*modo sit*" was a condition in this licence, and made the first benefice void when he took the second?

SECONDLY, Whether the bishop collating during the time of the archbishop's visitation, and after his exhibition, were good? — And because these questions concerned ecclesiastical jurisdiction, the court required to hear civilians in these points,

In a licence to a parson with cure of souls to accept of another benefice "*modo sit infra*" ten miles of the former, the words "*modo sit infra*" shall not be taken as a condition so as to make the first benefice void on the taking of the second.

S. C. Jones, 394.  
2. Roll. Ab. 357.  
Owen, 152.  
Co Lit. 203.

Q. If a collating by a bishop during the archbishop's visitation, and after

his prohibition, be good. 2. Bl. Rep 969.

DOCTOR

DODSON  
against  
LYNN.  
R. 421. 696.

DOCTOR DUCK and DR. EDEN argued on the part of the defendant, and DR. WILLIAM LEWEN for the plaintiff. And it was moved on the defendant's part, and there were shewn divers texts in the civil law, that "*modo*" and "*dummodo*" are express provisos in such licences, and do not make a condition, unless there be added other words, "*that if he do otherwise, that then it shall be void*;" but it is only as an admonition or caution, that he shall be punishable by ecclesiastical censures, if he doth otherwise: and that this hath been always the exposition upon granting such licences.

Co. Lit. 203. b.  
204.

And, after argument at the bar, ALL THE COURT resolved, that this being there the exposition always after the statute, although it be generally a condition in the exposition of the law, as "*dummodo*," "*ita quod*," and the like, yet it is now to be expounded as it hath been usually; otherwise great inconveniences would ensue, the multitude of benefices would be void, and in lapse to the king, where they have been quietly enjoyed by the other construction, after such avoidances pleaded. And therefore they all agreed, that it should not be here taken as a condition to make the first benefice void by the 21. Hen. 8. c. . but should be left as it was at the common law before the statute; and that the taking of a second benefice makes not the first void *quoad* the patron until deprivation, as it is in 4. Co. 75. b. in *Holland's Case*: and then THE SECOND QUESTION, Whether the collation by the bishop, in the time of the archbishop's visitation and after inhibition, will not be material. Wherefore it was adjudged for the defendant.

## CASE 5.

## Baker against Willis and Others.

Easter Term, 11. Car. 1. Roll 46.

The king is bound by the statute 32. Hen. 8. c. 28. f. 6. although he is not named in it; and therefore if a husband levy a fine of the wife's land to the king, yet the wife may enter after the death of her husband

S. C. Jones, 393.  
S. C. 2. Roll.  
Ab. 357.  
9 Co. 138. b.  
2. Roll. Rep.  
490.  
Hutton, 84.  
Co. Lit. 28. b.  
Fargrave's edit.  
Fote (1)  
Cowp. 201.

**EJECTMENT** upon a lease for seven years of a messuage and lands in *Muriel Grange*, in the parish of *Belton*. Upon not guilty pleaded, and a special verdict found, the case was, *John Beamond* and *Elizabeth* his wife, tenants in tail to them and the heirs of their bodies, of the gift of *Sir Humphry Foster*, remainder to the right heirs of the said husband, the said *John Beamond* having issue betwixt them *Francis Beamond*, in 6. Edw. 6. levies a fine *sur cognisance de droit come ceo* to king Edw. 6. with proclamations. The king, in the seventh year of his reign, grants those lands to *Francis Earl of Huntingdon* and his heirs: afterwards, in 2 September, anno 5. & 6. Phil. & Mary, the said *John Beamond* died. Upon the tenth of September the same year *Elizabeth* enters, and *Francis Earl of Huntingdon* died seised of the reversion, which descended to *Henry Earl of Huntingdon*, who by indenture betwixt him and the said *Elizabeth* (in 16. Reg. Eliz.), reciting that the said *Elizabeth* held the tenements in tail of the gift of *Sir Humphry Foster*, remainder expectant to the right heirs of the *Earl of Huntingdon*, raises, allows, and confirms to the said *Elizabeth* all her estate, title, and interest in the said tenements, *habendum et tenendum* the said tenements to the said *Elizabeth* and the heirs of the body of her and the said *John Beamond* engendered; with warranty of the said tenements

BAKER  
against  
WILLIS and  
OTHERS.

ments to the said *Elizabeth* and the heirs of the body of her and the said *John Beamond* engendered, against him and his heirs. *Elizabeth* dies 29. *Eliz.* *Francis Beamond* enters, and hath issue *Sir Henry Beamond*, *Sir John Beamond* and *Francis Beamond*, and dies 41. *Eliz.* *Sir Henry Beamond* by indenture covenants to stand seised to the use of himself and the heirs males of his body, remainder to *Sir John Beamond* his brother and the heirs males of his body, and afterward dies without issue male, his wife *enscent* with a daughter (afterward called *Barbara*), the wife of *Woolstan Dixy* the lessor: afterward *Sir John Beamond* died, and had issue *Sir John*, who entered and let to the defendant; and *Woolstan Dixy* entered in right of his wife, and let to the plaintiff, *prout* in the declaration, who entered, and the defendant ousted him.

The question was, Whether the plaintiff hath any title?

It was divers times argued at the bar, and now at the bench by *BERKLEY*, that judgment ought to be given for the defendant.

FIRST, Because the fine with proclamations did bar the estate tail, which *John Beamond* and the heirs of the body of *John Beamond* and *Elizabeth* claimed; for he being barred as heir of the body of his father, can never claim that estate; for he is barred by the acts of parliament 4. *Hen.* 7. c. 24. and 32. *Hen.* 8. c. 28.: and he much insisted upon the validity of fines, that they be perpetual bars against the heir in tail of him who levies the fine.

SECONDLY, He argued that *Elizabeth*, by her entry immediately after the death of her husband, reduced the estate tail back to her, and it was lawful and saved to her by the statute of 4. *Hen.* 7. c. of Fines, and by the statute of 32. *Hen.* 8. c. 28. of Discontinuance: and that she was tenant in tail, and not tenant in tail after possibility, as it hath been argued at the bar, nor in nature of such a tenancy in tail, but an absolute tenant in tail to all purposes.

2. Inst. 681. Co. Lit. 326. 8. Co. 72. Brownl. 131.

THIRDLY, That the tail is so barred by the fine, and the acts of 4. *Hen.* 7. c. 24. and 32. *Hen.* 8. c. 28. that he cannot claim, for he is a person disabled to claim; as a person attainted, although he hath a pardon, cannot claim by descent: and as one presented by simony to a benefice, being void, cannot be presented to it again, for he is a person disabled by the act of parliament; and by the confirmation to *Elizabeth*, *nihil operatur* to her, nor to the heirs of the body of her and *John Beamond*, because he in reversion had but a possibility to have it after the death of *John Beamond* without issue, and during the time he had issue he might not claim: and a possibility cannot be transferred to another: and *John Beamond* who entered shall have it as an occupant; for the heir general is barred by the fine, and he in reversion cannot have it, as long as there is any heir of the body of *John Beamond* and *Elizabeth* in esse, and any who enters shall have it as an occupant, as in the case 29. *Affise*. Wherefore he concluded, that judgment should be given for the defendant; for he had the priority of possession.

But



If husband and wife be tenants in tail, and the husband alone levy a fine, it bars all the issue; but the wife may enter within five years after the death of her husband, and this entry will revive the estate tail as to her, so as to render her capable of receiving a confirmation of it from the reversioner.

Ante, 435.

8. Co. 72.

9. Co. 140, 141.

10. Co. 50.

Cre. Jac. 689.

Cowp. 201.

But I argued to the contrary, that judgment ought to be given for the plaintiff. FIRST, I agreed, that the fine with proclamation was an absolute bar and discharge of the estate tail against *John Beaumont* and the heirs of his body, by the express words of the statute of 32. Hen. 8. c. . and it is *quasi* extinct against him by the fine, 3. Co. 51. *Sir George Brown's Case*, and 5. Hen. 7. 30.—SECONDLY, I agreed, that when *Elizabeth* entered within the five years after the death of *John Beaumont*, who levied the fine, she is absolute tenant in tail; for the fine *quoad* the said *Elizabeth* is absolutely avoided, and she is in as in her former estate, which is an absolute estate tail, and no tail after possibility of issue extinct; and if she be to sue any real action, she is to name herself tenant in tail. *Dyer*, 331. and 351.—THIRDLY, That notwithstanding the estate tail is barred by the fine, yet this confirmation, being by indenture, hath revived the estate tail; for although he in reversion, by reason of the fine, may enter and have the land, and the issue after the death of the wife is barred to claim it, yet by this confirmation he in reversion hath excluded himself against his confirmation to claim it, for he may exclude himself of his estate; and as he may avoid, so he may confirm. 1. Co. *Mayo's Case*, 11. Hen. 7. 28. *F. N. B.* 98. a. where tenant in ancient demesne levies a fine, &c.: and although at the time of the confirmation he had nothing to confirm, and his words of confirmation will not add to the estate of the wife, who had an estate tail, yet by the words "*habendum the tenements*" there is a new estate tail extracted out of the reversion, and settled in *Elizabeth*, so as that confirmation is *quasi perficiens et crescens*; and as the case in *Littleton*, 525. *feme* tenant for life takes an husband, a confirmation to the husband and wife, "*habendum the land to them*," increaseth the estate to the husband. 9. Co. 139. b. And whereas it was held, that she had as great an estate before as she had by the confirmation, and therefore the confirmation was void, I held, that although she had an estate tail, yet she takes by the confirmation; for a deed shall never be void when by any intendment it may be allowed to be good, and to have any operation: and she takes it for the benefit of the heirs of her and her husband's body; and although the heir be barred by the fine, yet he is restored to the estate tail by the confirmation; for the fine was an estoppel to the heir to claim against the fine, so the indenture of confirmation is an estoppel to him in reversion, to say that he shall not hold it in tail, and there it is an estoppel against an estoppel, which sets the matter at large, as it is *Co. Lit.* 352. b. 12. Hen. 7. 4. And although it was said by my brother *BERKLEY*, that the *Earl of Huntingdon* hath but a possibility to have it after the death of *Elizabeth*, and that he hath it but as an occupant, to have and enjoy it during the time that *John Beaumont* had issue of the said *Elizabeth*, I utterly denied that he hath but a possibility; for he hath it as in right of his reversion, if his confirmation had not barred him; and that appears by *Austin's Case* (a), and in *Husley's Case* (b), where an estate is barred, or discharged, or extinct, as *Sir George Brown's Case* (c) terms it, where he in reversion shall have it as in point of reversion; and if he hath but a possibility, yet that may be well transferred by confirmation or release to him who hath the possession of the land, as

(a) *Plowd.*

(b) *Cre. Eliz.* 519.

(c) 3 *Co.* 50.

it is resolved *Fulwood's Case* (a), and *Lampet's Case* (b). And as it is holden *Corbet's Case* (c), that there is no condition, proviso, or any other title but may by apt words be determined the one way or the other, so here every part agreeing, the estate tail shall be revived, or at leastwise newly created, and the law shall adjudge it according to their interest; and therefore I was of opinion, that judgment should be given for the plaintiff.

BAKER  
against  
WILLIS and  
OTHERS.

But JONES and BRAMPSTON, *Chief Justice*, deferred their arguments that day, hearing that the parties were about agreement: and afterward, by our means, they compounded, and Sir John Beaumont agreed to pay 5000l. and the others agreed to assure the estate by fine, or otherwise, &c. *E: sic materia prædicta sepita fuit*, and no judgment given. But JONES told me, that he was clear of opinion, that the plaintiff had good title, and that the confirmation was good, and created a good estate in *Elizabeth*, descendible to her heirs.

(a) 4. Co. 64.

(b) 10. Co. 48.

(c) 1. Co. 83. b.

## Michaelmas Term,

13. Car. 1. In the King's Bench.

Sir John Brampton, *Knt.* Chief Justice.

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt.* Attorney General.

Sir Edward Littleton, *Knt.* Solicitor General.

} Justices.

### CASE 1.

#### Ceely against Hopkins.

To accuse a person of having bewitched another is actionable.

*Vide ante*, 474.

Jones, 396.

1 Roll. Ab. 46.

**T**HIS Case was now moved again by GERMYN, *Serjeant*, and pressed to have judgment.—And ALL THE COURT resolved, Forasmuch as the words are, “bewitched me and my aunt,” and she is found guilty of malicious speaking of them, it shall be intended and conceived to be spoken according to the common sense of bewitching their persons, and not of bewitching with fair words. Whereupon judgment was given for the plaintiff.

### CASE 2.

#### Sherlock against Chandler.

*Hilary Term*, 12. Car. 1. Roll 618.

*Venire facias*

*Ante*, 17. 162.

S. C. Jones, 395.

2 Roll. Ab. 612.

Cro. Jac. 8. 150.

326

Co. Lit. 125. a.

**E**RROR to reverse a judgment in *replevin*. The error assigned by GRIMSTON was in the mis-trial of the issue, Because the issue being, Whether lands in Bromley were held of the manor of Webbs by such services, the *venire facias* was awarded *de vicineto de BROMLEY*, where it ought to be *de vicineto* of the manor, or *de vicineto de BROMLEY* and of the manor?—And ALL THE COURT, *absente* BRAMPSTON, held, that the trial by the common law ought to have been *per vicinetum* of both; and that such a mis-trial had been cause of reversal, &c.: but it is aided by 21. Jac. 1. c. 13. which points, that if a trial is to be of several places, it shall be tried *per vicinetum* of any of the places; and it is well enough.

### CASE 3.

#### Seaman against Bigg.

*Trinity Term*, 13. Car. 1. Roll 1009.

To say of a servant who is in an employment of trust and confidence, that “he is a cozening knave, and hath cheated his master,” is actionable.

*Post*, 563.

1 Roll. Ab. 43

2. Lev. 214.

1 Com. Dig

179. 1. Term Rep. 110.

**A**CTION FOR WORDS. Whereas the plaintiff was servant in husbandry to J. S. and was his bailiff, and in great trust with him, and thereby got his means and maintenance; that the defendant, to disgrace and discredit him with his master and others, spake of him these words, “Thou art a cozening knave, and hast cozened thy master,” *innuendo* the said J. S. “of a bushel of barley.” The defendant makes justification; and it was found against him.

FARRER now moved in arrest of judgment, that these words are not actionable; for no action lies for calling one “cozening knave,” or “cheating knave.”

But



But ALL THE COURT, *absente* BRAMPSTON, held, That true it is, generally an action will not lie for calling one "cozening knave," yet where the words are spoken of one who is a servant and accompant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and means of maintenance, there is good reason it should bear an action, that he might have recompence for loss of his credit and means. Wherefore it was adjudged for the plaintiff.

SEAMAN  
against  
BIGG.

South and Others, Bail for Jefferson, at the Suit of Gryffith.

CASE 4.

Hilary Term, 12. Car. 1. Roll. 559.

ERROR of a judgment in the common pleas, brought by the bail. The writ supposeth, that the error was in the principal judgment; and also in the judgment upon the *scire facias* against the bail, "*et in redditione executionis superinde.*" The error was assigned in the execution against the bail, that no *capias* was awarded against the principal.

JONES said, It was a question stirred in the common pleas, Whether an exception might be in the common pleas against the bail, where no *capias* issued against the principal?

HOBART, *Chief Justice*, was of opinion, that it might, because the recognizance by the bail in the common pleas differs from the course of the bail in the king's bench; for there the recognizance is in a sum certain, that the principal shall render his body.

But ALL THE OTHER JUSTICES there held, that it is all one in the common pleas and in the king's bench, that a *capias* against the principal ought to be taken forth, and returned *non est inventus*, otherwise no *scire facias* ought to be against the bail; for if the principal be taken by the *capias*, or that he render himself to prison upon the judgment, then no execution ought to be against the bail.

ALL THE COURT here were of the same opinion.

Then it was moved, that this writ of error was ill, because the writ of error is brought by the bail for error in the principal judgment, which the bail cannot have.—And thereto THE COURT agreed, that the bail cannot assign error in the principal judgment, nor can take advantage of any error therein.

AND THEY FURTHER HELD, that if the writ of error had been brought for error only in the principal judgment, it had been clearly ill.—But because the writ of error supposeth error in the principal judgment, and also in the judgment upon the *scire facias* against the bail, as also in *redditione executionis superinde*, JONES held, that the writ of error will lie for that part, and shall be void for the residue. But BERKLEY and MYSELF, BRAMPSTON *being absent*, were of opinion, that the writ was ill, and should abate in all, because it is grounded upon the first judgment, and also upon the judgment in the *scire facias*; and so coupling them together, all is void: but if the bail in their writ of error had recited the first judgment (as of

A *scire facias* against bail cannot be had until a *capias* against the principal is returned *non est inventus*.

Post. 561.

Jones, 396.

1. Roll. Ab. 333.

749. 779. 889.

4. Leon. 102.

1. Saund. 299.

Salk. 599, &c.

2. Lut. 1273.

Gilb. Ex. 98.

1. Com. Dig.

478. 498.

1. d. Raym. 28.

1. Will. 269.

Tidd, 129, 130.

Bail cannot have error of the principal judgment.

Post. 561.

Cro. Jac. 171.

1. Roll. Ab. 749.

2. Leon. 101.

Carth. 447.

1. Salk. 89. 603.

5. Mod. 397.

6. Mod. 304.

Comb. 149. 161.

1. Com. Dig.

498.

5. Com. Dig.

291.

1. Term Rep.

674.

3. Term Rep.

79.

necessity

**SOUTH and  
OTHERS  
against  
RAYFITH.**

necessity they must make mention thereof) and the second judgment in the *scire facias*, and alledged error in that judgment and in the execution thereof, &c. it had been well enough.

## CASE 5.

## Sacheverill against Porter.

Trinity Term, 11. Car. 1. Roll 324.

Common appurtenant is claimable by an existing grant as well as by prescription, though only part of the land is stated in the pleadings to be conveyed by feoffment, without saying by deed.

S.C. Jones, 397.  
1. Roll. Ab. 400.  
2. Roll. Ab. 60.  
Co. Lit. 122. a.  
126. b.  
8. Co. 79 a.  
1. Roll. Rep. 234.  
2. Com. Dig. 227.

**T**RESPASS *quare clausum fregit, et cum averiis depasc. &c.*  
Upon a special verdict the case was, That one FULK, of Peterborough, and others were seised in fee of the place WHERE, being a great waste called *Atterhall-beath*; and being so seised, 2. Hen. 4. granted by deed indented to the prior and convent of Stone (who were seised in fee of three messuages, one hundred acres of land, thirty acres of meadow, and fifty acres of pasture, in Stallington) common for him, "*et omnibus tenentibus suis in STALLINGTON pro omnibus averiis suis communicabilibus omni tempore anni in predicto vasto, HABENDUM the said common of pasture to the said prior and convent, et successoribus et tenentibus suis in perpetuum.*" The priory being dissolved, the king grants the said tenements, with all commons to them appertaining and therewith enjoyed, to Rowland Hill and his heirs; who by feoffment conveys three-and-thirty acres, parcel of those tenements, *cum pertinentiis*, to the defendant; who therefore justifies the using of the said common appurtenant.

THE QUESTION was, Whether common created 2. Hen. 4. and so within time of memory granted to the prior and tenants, &c. may be said common appurtenant to the said tenements in Stallington?

RESOLVED, That it may; for being granted to him and his tenants of Stallington, it is common appurtenant, and may pass by feoffment as common appurtenant, together with the said tenements.

SECONDLY, Although but part of the land is conveyed, and not the entire, yet it is common appurtenant, as common for the beasts *levant et couchant* upon the said tenements, and well shall pass with them by the words *cum pertinentiis*; and although it be common created within a time of memory, it is common appurtenant, and may be well apportioned. *Vide 8. Co. 78. Weild's Case.*

THIRDLY, Although the pleading and verdict is, that feoffment was of part of the said lands, and doth not say that it was by deed, Ante, 162. 181. yet it is good enough. Wherefore it was adjudged for the defendant. Cro. Jac. 411. *Vide 36. Aff. 3. 15. Aff. 11.*

## CASE 6.

## Lady Fulwood's Case..

*Vide Post. 484. 488. 492.*

Counsel assigned on an indictment on 3. Hen. 7 c. 2. for forcible marriage, to advise (upon points stated) what should be pleaded in matters of law; and, upon prayer, a copy of the indictment was granted.

**L**ADY FULWOOD, Roger Fulwood her son, one Richard Bowen, and divers others, not prisoners but at large, were indicted in the county of Surrey, That WHEREAS Sarah Cox was a maid,

maid, who had a portion of thirteen hundred pounds, the said *Roger Fulwood*, by the procurement and abetting of the said *Lady Fulwood*, at the parish of *St. Saviour's*, violently, and with force, and against the will of the said *Sarah*, took and carried the said *Sarah* to *St. Saviour's*, and there married her, by the aid and procurement of the said other persons, against the form of the statute in that case provided. Upon this indictment they being arraigned, pleaded "not guilty," and put themselves upon the country.

LADY FULWOOD'S CASE.

2. Hawk. P. C. 312. 565.

The said *Roger Fulwood*, *Richard Bowen*, and one *John Hoxton*, a coachman, were indicted in the county of *Middlesex*, For that the said *Sarah* being a person having a portion of thirteen hundred pounds, for lucre of the gain of the said portion, they took her at *Newington* in the county of *Middlesex*, against her will, and carried her to *St. Saviour's* in the county of *Surrey*, and there the said *Roger Fulwood*, by the aid, abetment, and procurement of the said *Bowen* and others, married the said *Sarah* in the said parish of *St. Saviour's*, in the county of *Surrey*, against the form of the statute in that case provided. The said defendants being arraigned upon this indictment, prayed counsel to be assigned them, to be advised what they should plead for matter in law; for it was pretended, that this taking in one county and marrying in another county was not triable in the county of *Surrey*.

HOLBOURN and HENDEN, *Serjeant*, were thereupon assigned of counsel with them. And they alledged, that in the case of one *Bruton* it was resolved, upon a reference out of the star-chamber, by all the Justices, that the taking away of a woman, unless she be married or defiled, is not felony within the statute: and hereupon the counsel prayed, that they might have a copy of the indictments.—And it was allowed by the Court, that they should have a copy of the indictment in *Middlesex*, but not of the indictment in *Surrey*.

Sir John Fitzherbert against Sir Edward Fitzherbert and Others.

CASE 7.

**EJECTIONE FIRMÆ.** Upon evidence to the jury, it was resolved by all the Court, Whereas *Sir Thomas Fitzherbert* and *Sir John Fitzherbert* his brother, being tenants for life, the one in remainder after the other, the remainder in tail to *Thomas Fitzherbert*, their nephew, upon purpose to bar this intail, the 1st October 25. Eliz. made a lease for years, with agreement that the lessee should make a feoffment of this land, who accordingly the 12th October made the feoffment; and afterward, on the 17th October, *Sir Thomas Fitzherbert* released to the feoffee with warranty, and on the 19th October *Sir John Fitzherbert* released to the feoffee with warranty, and both these warranties descended upon *Thomas Fitzherbert* in remainder: **RESOLVED**, That these warranties were warranties commencing by disseisin, although they were created seven days after the feoffment; for the feoffment was made by covin, and with an intent and agreement precedent, that there should be such a feoffment and releases made after; and they be all but as one act, grounded upon this fraud and practice, and shall not bind him in remainder (a).

Tenant for life makes a lease. The lessee, as by private agreement, enfeoffs a stranger. The tenant for life releases to the stranger with warranty. This is a warranty commencing in disseisin, and shall not bind him in remainder.

Co. Lit. 49. a. 367. a. S. C. Jones, 397. S. Co. 79. Cowp 701.

(a) Ante, 306.

SECONDLY,



If after this secret disseisin the remainder-man had levied a fine to the stranger, it would have enured to the conusor.

Jones, 316.

Co. Lit. 49.

note (4).

Goldsb. 162.

2. Co. 56.

1. Lev. 128.

3. Com. Dig. 361.

SECONDLY, It was moved, if *Thomas* after this disseisin, not knowing of the disseisin, had levied a fine to the stranger, Whether that should have barred his right, and enured to the benefit of the disseisor, according to 2. Co. 56. a. *Buckler's Case*, which, if admitted, would be of a very mischievous consequence. — But herein THE COURT delivered no opinion. But BRAMPSTON and MYSELF conceived, that it should not enure to the benefit of the disseisor, but to the use of the conusor himself; for otherwise a disseisin being secret may be the cause of disinherison of any one who intends to levy a fine for his own benefit, for assurance of his lands upon his wife and children, or otherwise.

#### CASE 8.

#### Moulin against Sir George-Dallison.

The existence of a custom of *Borough English*, by which the eldest daughter shall inherit, is a question of fact for the jury.

Co. Lit. 140. b.

1. Com. Dig. 6c8.

THE question was, Whether the manor of *Sherfield* was by custom descendible to the eldest daughter? The plaintiff, to prove this custom, shewed, that it was parcel of the manor of *Odiham*, which is *ancient demesne*, in which manor the custom is, that lands are descendible to the eldest daughter.

But on the other part was shewn, that it cannot be parcel of the manor of *Odiham*, because it appears by divers records that this manor of *Sherfield* was held of the king by *grand serjeanty*; and although it was agreed on both parts that there is such a custom within the manor and vill of *Odiham*, yet forasmuch as the manor of *Sherfield* holds by such service, it cannot be parcel of the manor of *Odiham*.

But to that was answered, That this tenure in grand serjeanty was created by king *Edward* the second: and if there were such an ancient custom, it cannot be destroyed nor altered by alteration of the tenure;—which was agreed by ALL THE JUSTICES. Whereupon, because divers precedents were shewn that lands of the freeholders used to descend there to the eldest daughter, and lands in *Sherfield* used to be recovered by a writ of right close, in the court there, it was left to the jury to enquire, Whether there were any such custom?

A juror cannot be withdrawn except by consent. (a) Co. Lit. 104.

A defendant cannot have a new trial the same Term.

*Sed vide* 10. Co. 104. 2. Roll. Abr. 671. 2. Hawk. P. C. 575.

And because the jurors, lying all night, could not agree, a juror by consent was drawn (a).

(a) Co. Lit. 104. 10. Co. 104. Carth. 465. Foster, 16. 39. 76. 328.

Afterwards the defendant prayed a new trial, and a *tales* by proviso:—but it was held by ALL THE COURT, that the defendant could not pray a *tales* this Term, but he might in another, &c.

#### CASE 9.

#### Lady Fulwood's Case.

*Ante*, Page 482. *Post*. 488. 492.

An indictment on 3. Hen. 7. c. 2 must charge that the defendants took and carried away the

THE precedents of the court were searched, and one case was found in *Easter Term*, 31. Hen. Roll 14. among the pleas of the crown, where *Henry Sturges* and *Philip Sturges* were indicted for the taking of one *Agnes Holson* against her will, who woman with intention to marry or defile her. *Sed vide post*.—1. Hale, 66c. 5. St. 11. 468. Hob. 182. Dalif. 22. 3. Inst. 61. Sum. 118.

was the daughter and heir of *John Hobson*, who was seised of lands to the value of twenty pounds a-year: and they pleaded to the indictment, that they ought not to answer, because it is not alledged in the said indictment, "*quod ceperunt ad intentionem maritandi prædictam AGNETEM vel ad prostituendum, &c.*;" and they were discharged.

LVDY FULWOOD'S CASE.

Another record was shewn in *Hilary Term*, 3. & 4. *Phil. & Mary*, Roll 10. where *Roger Thompson* and *Peter Rewley* were indicted, For that they feloniously did take *Margaret Burton* and *Margery Burton*, daughters and coheirs of one *Roger Burton* deceased, and against their wills, &c. And they pleaded, they ought not to answer to the said indictment, *pro eo quod apparet in quo loco nec quomodo* they took the said daughters; and because it was not alledged in the said indictment that the said *Roger* or *Peter* married or defiled the said *Margaret* or *Margery*.—*Its alers sans jour*.

An indictment on 3. *Hen. 7. c. 2.* must state the place and manner of taking, and alledge that the woman was married or defiled.  
Hob. 182.

NOTE, That LORD HOBART sets down (a), that one *Bruton* exhibited his bill in the star-chamber against *Edmund Morice* for stealing away his daughter, he being seised of lands and having goods to the value of five thousand pounds, and she was not his heir, for he had son: and she was enticed away by friendship, and then by force carried into *Suffolk*, and there married; and, Whether this were within the statute of of 3. *Hen. 7. c. 2.*? was referred to the two Chief Justices, and to have the opinion of the other Justices. And they all upon perusal of the statute and view of precedents resolved, that it was not within the statute: for although they held, that the party being first taken away with her own consent, and after by force carried into *Suffolk* (from which time the forcible taking began), was forcible taking away within the intent of this act; and although the words in the purview seem to be general, and to extend to all women, unlawfully taken against their wills; yet considering that the preamble of the statute cannot be conceived to be idle, but must be intended to restrain the purview to the particular cases in the preamble mentioned, that is to say, that they shall be maids, widows, or wives, having their substance in lands or goods, or otherwise heirs apparent, that the motive be lucre, and the end to be married or defiled; and the purview, that what person or persons should steal away a woman so against her will unlawfully, &c. it was conceived, that the word "*so*" did imply and bind up the preamble to the purview, otherwise the word *so* were idle and might have been spared, if it did declare the motives and the ends of the action, which in this case were lucre and luxuriousness. Precedents were shewn in *Easter Term*, *Hen. 7.* an indictment against *Hyelord* and others; and in *Hilary Term*, 3. & 4. *Phil. & Mary*, against *Polley*, wherein no mention is made that they were entitled to lands or goods, or that they were heirs apparent; but there were seven or eight precedents shewn wherein it was mentioned.

An indictment on 3. *Hen. 7. c. 2.* must expressly alledge that the woman taken away had land or goods, or was heir apparent; for the enacting clause, by making the offence to be the taking of a woman so against her will, clearly refers to the preamble.  
3. *Inst. 61.*  
1. *Hale, 660.*  
3. *Mod. 701.*  
Hob 182.  
1. *And. 115.*  
*Savil, 59.*  
12. *Co. 20. 100.*  
110.  
1. *Hawk. P. C. 171.*  
5. *St. Tr. 450.*  
3. *Bac. Ab. 577.*

(a) Hobart, 182.

To take a woman forcibly away, unless she be afterward married or defiled, is not felony.

Hob 182, 183.

1. Hale, 66.

1. Hawk. P. C. 172.

And in LORD ANDERSON'S REPORTS, in *Hilary Term*, 16. Eliz. it was agreed by the Justices, that if a woman be taken against her will and enforced to contract herself in marriage, yet is not married, it is no felony; but if she be married or defiled, it is felony: and there it was said, that if the taking of such a woman, and the marrying or defiling be in several counties, it is felony compounded of all the three parts; as stroke and death are but one murder.—*Ref. duum postea*, pages 488. 492.

## CASE 10.

## Sydnam and Parr's Case.

Michaelmas Term, 12. Car. 1. Roll —Surrey.

If a person possess land, enter it forcibly, and detain it from a person claiming right of common therein, he cannot be committed by a justice on view, by virtue of 15. Rich. 2. c. 2. for a forcible detainer. Ante, 201.

Dalt. c. 77.

rompt 70 b.

Dyer, 141.

1. Hawk. P. C.

275. 282.

3. Com. Dig.

364.

2. Stra. 794.

**S**YDNAM and PARR were brought to the bar by *habeas corpus*; wherein was returned, That they were committed to gaol by one Read, justice of peace of the said county, by force of the statute of 15. Rich. 2. c. 2. upon complaint of one J. S. that he claimed common in a meadow of the said Sydnam's, called *Monk's Meadow*; and that the said Sydnam and Parr entered into the said meadow, and kept him out from his common with force and arms: wherefore he was prayed to view the force, and that he came thither, and found them holding the said meadow with force; whereupon he by virtue of the said statute committed them to gaol.—Upon the motion of GRIMSTON, and reading the return, ALL THE COURT (BRAMPSTON being absent) held, this commitment was not warranted by that statute: for although one may be disseised of a rent or common by force, which is enquirable in assizes, and punishable if it be found, yet one may not be indicted or committed for entering his own land with force, or holding his own land with force, against a commoner; for it ought to be *ubi ingressus non datur per legem*, and one in his own land may enter lawfully, and may detain with force against any who pretend to have common there, he being allowed to be owner of the soil: and this statute is not to be extended against any but him who enters unlawfully, and ousts another of his lawful possession: wherefore the cause of committing and detaining them in prison was held unlawful, and the prisoners were discharged.

## CASE 11.

## Bower and his Wife against Cooper.

*Procedendo* granted in a clause removed by *habeas corpus* from LONDON for calling a woman "A WHORE." Ante, 350.

1. Roll. Ab. 550.

2. Roll. Ab. 69.

**A**CTION ON THE CASE in London for these words spoken of the wife, "Thou art an whore, and a twopenny whore." Upon an *habeas corpus* this cause being removed, I signed a *procedendo*, because I was informed it is good cause of action in London by the custom; for they ought to punish such persons there with carting and whipping, and that it lies not in the court.

PHEASANT now moved to have a *superfedeas*, and the cause removed; for he said, it was against law to suffer such actions to be prosecuted in London upon pretence of a custom, where they are not maintainable in the superior courts; and that for calling a "whore," or "adulterer," and the like, an action lies not at common law. *Vide Register*, 54. 4. Co. *Murford's Case*, where for these words it was held an action lies not.

Ston



STONE prayed, that no *superfedeas* might be granted; for he said, an action lies in *London* for these words by the custom, because an whore there is to suffer corporal punishment, viz. carting and whipping: and it is an offence presentable at the wardmote's inquest, and there punishable; so, being subject to a corporal punishment, it is reason she should have her action there: and if the party conceives himself grieved, he may have a writ of error; and if against law, may reverse it: and he cited a case in *Trinity Term*, 8. Car. 1. where such a cause being removed by *habeas corpus*, a *procedendo* was awarded in this court upon debate.

And so ALL THE COURT held here, except BERKLEY, who conceived, that a *superfedeas* ought to be granted.

STONE alledged, that by the statute 21. Jac. 1. c. 23. after a *procedendo* is granted, no *superfedeas* ought to be awarded.—But THE WHOLE COURT was against him in that point; for when a *procedendo* unduly vel improvidē emanavit, the use is to grant a *superfedeas*.

But here it was conceived by JONES, BRAMPSTON, and MYSELE, that the *procedendo* was well awarded; therefore we denied to grant a *superfedeas*.

BOWER and his WIFE against COOPER.

4. Co. 18.  
Cro. Jac. 485.  
Lev. 116.  
Carth. 75. 213.  
1. Com. Dig. 180.

But see the case of Staunton v.

Jones,  
Dougl. 380.  
381. notis.

A *superfedeas* may issue after a *procedendo* awarded.

### Kinnion against Davies.

CASE 12.

*Trinity Term*, 12. Car. 1. Roll 1096.

ERROR of a judgment in the common pleas in an action on the case, For that the defendant a certain dog *ad mordendum oves consuetum* at HINDON *scienter retinuit et custodivit*; which said dog such a day and place one hundred sheep of the plaintiff's then and there found *tam graviter momordit*, that twenty of them died of the said biting, and the others were much hurt. Judgment being given there by default,

An action on the case for knowingly keeping a dog used to bite sheep, &c. must aver that the party knew he was used to bite sheep.

GRIMSTON assigned for error, That the declaration was not good; for he doth not shew, according to the usual course, "*quod sciens canem prædictum ad mordendum oves consuetum scienter retinuit*;" or it may be that he knowingly kept the dog, and yet knew that he was used to worry sheep; which is the main point of the action.

Ante, 254.

1. Roll. Ab. 4.  
Dyer, 25.  
5. Co. 18. b.  
Hot. 134.

Cro. Jac. 45.  
1. Vent. 295.  
Latch. 119.

2. Lev. 172.  
Lut. 90.

Salk. 662.

Bl. Com, 153.

ALL THE COURT, *absente* BRAMPSTON, upon reading the declaration, held, that it was not good. Whereupon rule was given, that the judgment should be reversed, unless, &c.

Strange, 1264. Ld. Raym. 608. 1. Com Dig. 208.

3. Bl. Com, 153.

## CASE 13.

## The Case of Fulwood.

*Ante, Pages 482. 484. Post. 492.*

On an indictment for forcible marriage, it is no excuse that the woman at first consented, if she afterwards refused, and was forced against her will.

**R**OGER FULWOOD, RICHARD BOWEN, and LADY FULWOOD were indicted by a jury of *Surry*; wherein was supposed, that the said *Roger Fulwood, Richard Bowen, Lady Fulwood*, and others, upon the twenty-third of *August*, in the ninth year of *Charles* the first, at *Southwark*, in the county of *Surry*, *violenter et felonice* assaulted one *Sarah Cox*, and her there took away by force and against her will; and the said *Roger Fulwood*, the 23d of *August* the same year at *Southwark*, married her the said *Sarah Cox*, by the abetment and procurement of the said *Bowen* and *Lady Fulwood*.

Upon this indictment, being arraigned, they pleaded *not guilty*; and now by a jury of the county of *Surry* they were tried; and upon evidence it appeared, that the said *Sarah* being an orphan, and having thirteen hundred pounds for her portion, was by force, with swords drawn, at *Islington*, in the county of *Middlesex*, taken away against her will by the said *Roger Fulwood* and *Richard Bowen* at eight of the clock at night, and put into a coach with the said *Roger Fulwood* and brought to the *Strand-bridge*, and from thence carried by water to the *Bishop of Winchester's* house; and the next day, upon the 23d of *August*, upon pretence of shewing her the house, brought into the chapel, and, being there much in fear (as she pretended and gave in evidence (a)), was married to the said *Roger Fulwood*, in the presence of the said *Lady Fulwood* his mother, and of the said *Richard Bowen* and divers others.

The defendant *Roger Fulwood* brought divers witnesses to prove she was willing to marry him; and that she being asked the question before by him, Whether she were willing to marry him? answered, That she was willing, and appointed a taylor to make her a gown, and was found in bed with him; but she pretended it was by reason of his threats, and when she was in such fear as she knew not what she did (b).

The defendant on an indictment for forcibly taking a woman in one county and marrying her in another, may be found guilty in another county.

Hob 183

**HOLBORN**, who was assigned of counsel for the prisoners, hereupon moved, that forasmuch as the force was in *Middlesex*, and no force was proved in *Surry*, the jury ought not to find them guilty in *Surry*.—But ALL THE COURT, *absente* **BERKLEY**, delivered their opinions *seriatim*, that if the jury found that she was taken with force in *Middlesex*, and carried in a coach to *Strand-bridge*, and brought by them into *Surry*, it is a continuing force, and a forcible capture in *Surry*, and an offence within the statute.

Hob 183 I. Hawk. P. C. 172.

Marriage by force is a marriage within the 3 H. 7. c. 2. 1 Sid 65. 2 Roll. Ab. 340

**HOLBORN**, Counsel, then alledged, that it was not a marriage; for she affirmed upon her oath in her examination, and now *videtur* that she knew not what she did.—But ALL THE COURT held, although this might avoid the marriage, that it is such a marriage as is an offence within the statute.

Dyer, 13. in marg. 1. Com. Dig. 549. 2 Bac. Ab. 159.

(a) 1 Hale, 661. 4. St. Tr. 455. 4. Ab. 577. 578 2. Hawk. P. C. 608. El. Com. 209. 3. Keb. 193. 1. Vent 243. (b) Roll. Ab. 340. Co. Lit. 31. 1. Burr. 424. B. R. H. 82. 265. 3. Bac. Co. 22. Keilw. 32. Dyer, 13. Sid. 65.

But for *Lady Fulwood*, because it appears not she was party to the forcible taking, or consenting thereto, it was not an offence in her within the statute: the jury therefore found *Roger Fulwood* and *Bowen* guilty, and *Lady Fulwood* not guilty.

unless they are also parties to the force.

HOLBORN, being assigned of counsel as aforesaid for matters in law arising upon the evidence, or otherwise, after verdict, moved in arrest of judgment, that the indictment was not good: FIRST, Because it is not expressed in the indictment that the taking was *ea intentione*, that the said *Roger Fulwood* would marry or defile the said *Sarah*; which is the exception in 31. Hen. 8. c. . for which that indictment was discharged.

SECONDLY, That whereas divers were indicted, the indictment was *cepit*, whereas it ought to have been *ceperunt*.

But ALL THE COURT, *absente* BERKLEY, resolved, that this was not any cause of exception; for in regard it appears apparently by the indictment that they took her, *et abduxerunt* (a) for lucre, and the same day married her the said *Sarah*, that shews the caption to be with an intent to marry her; also there are no such words in the statute *ea intentione*, the offence being by reason of the caption against her will.

And I delivered my opinion to be, that if one takes such a ward forcibly and against her will with an intention to marry her, it is felony, although marriage or defiling doth not follow thereupon. But JONES said, that it hath been resolved, and was so reported by *Dalison* (b), that forcible taking away against her will, if marriage or defilement did not ensue, was no felony. BRAMPSTON doubted thereof.

3. Inst. 61. 3 Keb. 193. 2. Vent. 243. 1. Hawk P.C. 172.  
(b) Dalison, 22.

### Wilner against Hold.

CASE 14.

ACTION FOR THESE WORDS: "Thou art a rogue and a rascal, and hast killed thy wife," *quandam Elizabetham nuper uxorem le plaintiff innuendo*. After not guilty pleaded, and found for the plaintiff, and damages twenty marks,

ATKINS and TREVOR moved in arrest of judgment, that no action lies for these words; for the words of "rogue" and "rascal" are but words of heat, for which no action lies: and thereto the whole Court agreed.

SECONDLY, It lies not for the words, "Thou hast killed thy wife," because it is not shewn that his wife is dead, nor how she was killed, nor that she was violently killed or murdered: and although the declaration is *nuper* his wife, yet that doth not prove that his wife was dead; for it may be they were divorced.

*Sed non allocatur*; for when it is said *nuper* his wife, it shall be intended she is dead, and not have such foreign construction that she was divorced. And THE COURT further held, that the words, "Thou hast killed thy wife," shall be intended according to the usual speaking, that he killed her voluntarily, and whatsoever way he killed her, the words are very scandalous. Whereupon it was judged, that the action lies.

1. Vent. 117. 149. 2. Bl. Rep. 960, and see the case of *Peake v. Oldham*, Kniveton

In "stealing an heiress," privies to the marriage, are not within the act,

An indictment on 3. Hen. 7. c. 2. need not allege that the taking was with intention to marry or defile. Ante, 485.

1. Hawk. P. C. 172.

False Latin will not vitiate an indictment.

(a) The roll is, "*ceperunt et abduxerunt*." See 2. Hawk. P. C. 338. 2. Ld. Ray. 1198.

2. If an indictment will lie on 3 Hen. 7. c. 2. for forcibly taking an heiress, unless either marriage or defiling issues.

*Rogue and rascal* are words of heat, but not of scandal.

An action lies for publishing words importing a charge of murder; and it shall be intended, without averment, that the party was dead. Yelv. 21.

1. Sid 53. 4. Co. 16. a. Cro. Eliz. 317. 569. 823. 1. Roll. Abr. 77. Cowp. 276.



## CASE 15.

## Kniveton against Latham.

Payment, after forfeiture, of the principal, interest, and costs, due upon a bond to an infant of eighteen years of age, who was one of three executors of the obligee, cannot be pleaded in satisfaction to an action of debt, by all the executors for the penalty.

*Sed quare. V. de*

4. C. 5. Ann.

c. 16.

Jones, 400.

1. Roll. Ab. 730.

Moor, 852.

Co. Lit. 172. a.

Cro. Eliz. 719.

Vent. 354.

3. Lev. 568.

2. Stra. 1028.

2. Bar. K. B.

183.

1. Com. Dig.

249.

2. Bac. Ab. 378.

1. Term Rep.

388.

**D**EBT by Daniel Kniveton, Francis Kniveton, and William Kniveton, executors of John Kniveton, upon an obligation made to their testator of one hundred pounds the 9. Car. 1. upon condition to pay fifty-two pounds.

The defendant demands *oyer* of the condition; which being entered, he pleads, That he paid fifty-two pounds to Francis Kniveton, one of the executors, in satisfaction of the said debt, and all interests and damages for it; and thereupon the said Francis released to him the said obligation.

The plaintiff replies, That the said Francis Kniveton was within age at the time of the release, *viz.* of the age of eighteen years.

The defendant upon this demurred.

ALESTRE, *for the defendant*, now shewed the cause of demurrer to be, Because he doth not deny the payment of the principal, interest, and damages: and although the bond was forfeited *rigore juris*, yet acceptance is good cause of his making the release, and he is not to take advantage of the forfeiture of the bond: and although he be an infant, yet being above the age of seventeen years, who may take upon him to be executor, his release as executor is good, and shall bind him and his co-executors.

ROLLE, *for the plaintiff*, argued, that this release, being by an infant, is void; for the bond being forfeited, the entire hundred pounds is due, and acceptance of part of a sum, *viz.* fifty-two pounds, cannot be taken as satisfaction; and this release shall not prejudice him, being an infant, for he hath loss thereby, and is in danger of a *devastavit*.

JONES and BERKLEY, *Justices*, were of opinion, that a release by an infant, although he be executor, without receipt of the entire debt, is not good, nor shall bind him; for although it is against conscience that he should take the forfeiture of the bond, yet he may if he will.

BERKLEY, *Justice*, held, that this giving a discharge of the entire bond shall be a *devastavit*, by which the infant being to receive prejudice, that deed shall not bind him.

But *I* HELD, that forasmuch as he did it only as executor, and according to good conscience, and none denies but that there was payment made of the principal debt, there is good cause this release should bind him; and that it should not be a *devastavit*, because he did that which he was compellable to do in a court of conscience. 5. Co. 27. b. *Russell's Case*. 16. Hen. 6. "Release," 45. 21. Bar. 4. pl. 29.

And afterwards, this Term, being again moved by ROLLE, *for the plaintiff*, BRAMPSTON, *Justice*, agreed with JONES and BERKLEY, that this release by an infant shall not bar, because the infant being executor, by course of law is to have the benefit of the forfeiture of the bond, and the entire sum in the bond is a debt due to the executor; and when the infant, being but one of the executors, takes part of the money only (although it be all which was due in conscience), yet this release shall not bar him.

but if he will take all the money, and make a release, then it is good; and if the defendant would have remedy, he is to have it in a court of equity (a), and cannot plead this release in bar at the common law. Whereupon rule was given, that judgment should be entered for the plaintiff, unless other cause were shewn upon the *Thursday* following.

The case was afterwards moved at the table in *Serjeant's Inn, Fleet-street*.

DAMPFORT, *Chief Baron*, and DENHAM, *Baron*, agreed, that this release, without payment of the entire sum contained in the bond, it being forfeited, was not any bar to the infant.

But BRAMPSTON, *Chief Justice*, and DAMFORT, *Chief Baron*, agreed, that such release by an executor of full age, upon receipt of the principal money and the interest, shall be only *assets* for the interest and money received, and shall not be a *devastavit* for the residue, because he did that which in good conscience he ought to do (b).

3. Peere Wms 381. 1. Com.

(a) But now by 4. and 5. Ann c. 16. brought (and bail put in, 6. Mod. 11.) payment of principal, interest, and costs, they may be paid into court and proceedings stayed. at any time before the action brought, may be pleaded in bar; or after action

KNIVETON  
against  
LATHAM.

(a) Show. Caf.  
Par. 15.  
Eq. Caf. Ab.  
91. 288.  
Salk. 154.  
1. Vern. 342.  
350.  
2. Vern. 509.  
299.

(b) Off. Ex. 228.  
1. Saund. 307.  
2. Lev. 189.  
Dig. 255.

### The King against Rooks.

CASE 16.

SCIRE FACIAS being sued in chancery against *Thomas Rooks*, A *scire facias* to shew cause wherefore his patent of the office of Searcher of the port of *Sandwich, cum membris*, granted to him for life, should not be seised as forfeited, because by inquisition upon a commission issued out of the chancery it was found, that divers misdemeanors were committed by him, to the great prejudice of the king, and forfeiture of his office; upon this the defendant appeared there, and traversed the points found in the inquisition; and thereupon twenty-six issues were joined upon so many several points found in the office, some of them being triable in *Kent*, others by a jury of *Middlesex*. Upon this, the record being delivered by the lord-keeper with his own hands, evidence was given at the bar to a *Kentish* jury upon seventeen of these issues.

One of them was merely for his absence from executing his office from the tenth of *June*, 10. Car. 1. to the twelfth of *August* following. To this the defendant pleaded, that he was sick all the said time; and issue being joined thereupon, he failed in proof thereof. The proof on the part of the plaintiff was, that he was well in health at *London* at that time: this issue was found for the plaintiff.

The voluntary absence of a port searcher from his duty is a forfeiture of office.

39. Hen. 6. 33. b.  
2. Bull. 85.  
3. Mod. 146.

Palmer, 80. Dyer, 238.

And to three other several times of his absence found in the inquisition, he pleaded that he was in prison, and in execution at the king's suit, by command out of the exchequer: and upon these three issues, because some doubt was conceived, forasmuch as the imprisonment was at the king's suit, whether that should be a misdemeanor in his offices, is a cause of forfeiture?—Co. Lit. 233. 2. Roll. Ab. 153. 1. Mod. 193. 1. Hawk. P. C. 311.

Qu. If the absence of a king's officer, occasioned by imprisonment at the suit of the

THE KING  
against  
ROOKS.

not excuse him for his absence in regard of the necessity, he being committed for debt to the king and misdemeanor in his office; to avoid therefore the question (there being many other causes of forfeiture of his office), it was conceived the king should not give evidence for them.

If a port searcher be absent, and, by not appointing a deputy, goods and merchandize are exported without being searched, it shall be considered voluntary, and a forfeiture of his office.

- 9 Co. 50.
2. Lev. 71.
3. Lev. 288.
- Dyer, 151. 238.
2. Bull. 53.
3. Mod. 140.

If an officer of the customs seize uncustomed goods, and, instead of taking them to the king's warehouse, convert them to his own uses, it is a forfeiture of his office.

3. Bac. Ab. 742.

Two other several issues were, Whether he voluntarily suffered a ship laden with several commodities (naming them) to be exported, and other ships to be imported and unladen, without being searched? And upon the evidence it appeared, that such a ship was imported and unladen, and others also were exported beyond seas, not being searched; but those were so imported and exported when neither himself or any of his deputies were there; so it appears not whether it was by negligence or voluntarily, for he did not know of them, and so not within that issue.—But ALL THE COURT held, that this voluntary absence and neglect, so as neither himself nor servants were there to search, is not only *crassa negligentia*, but a voluntary permission; as if a gaoler should leave his prison doors unlocked, and the prisoners escape, it is not only a negligent, but a voluntary escape: so here, &c.—Whereupon the jury found this issue against the defendant.

Another cause of forfeiture of the said office was in issue, viz. that he seized divers goods forfeited for not being customed, and accounted not for them to the king, but converted them to his proper use.—To this he pleaded, that he seized them, and that he was ready to account, and traverseth the conversion; and upon the evidence it appeared, that he seized them as forfeited, and never tendered to account, nor brought them into the exchequer, nor signified in the exchequer what they were (as he ought to have done), but he himself sold them at London, which was a clear conversion—Whereupon this issue was also found against him.

#### CASE 17.

Herbert against Laughlun.

Easter Term, 11. Car. 1. Roll 388.

An ejectment will not lie *de piscariâ* in a river, nor for common *apprehendere*, or rent, or other incorporeal hereditament. Ante, 362.

- Co. Lit. 9. a.
- Co. Lit. 5.
- Cro. Jac. 146.
3. Bl. Com. 206.

ERROR of a judgment in the king's bench in Ireland (a), in an ejectment. The principal error insisted on was, That this ejectment is brought *de piscariâ* in such a river—And because it was not *terra aqua cooperta*, nor of any land, but only of a profit *apprehendere*, ALL THE COURT, *absente* BRAMSTON, Chief Justice, held, that an ejectment lies not thereof, no more than of common *apprehendere* or rent; wherefore for this error the judgment was reversed. But JONES said, that peradventure an assise would lie of such a piscary, because it is *prosecutum in certo loco capiend.*; but he cannot maintain an ejectment.

8. Mod. 277.
- Yelv. 143.
1. Brownl. 142. 129.
1. Lev. 114.
- Sid. 161.
- Str. 34.
- Dougl. 466.
1. Term Rep. 11.

(a) But this dependency is repealed by 22. Geo. 3. c. 53.



## Fulwood and Bowen's Case.

CASE 18;

*Vide Ante, P. 482. 484. 488.*

ROGER FULWOOD and RICHARD BOWEN, having been found guilty on 3. Hen. 7. c. 2. being brought to the bar, and demanded what they could say why judgment should not be given against them, answered, that they had not any more to say. And THE COURT, being full, resolved that judgment should be given.

JONES, Justice, pronounced it, and said, that although it had been objected, and was divulged, that it was an obsolete statute, and it would be hard if any should be condemned thereupon; he thereto answered, that they were deceived, for it is a good statute and in use, but many had not been executed thereupon, because they had their clergy, for the taking whereof away the statute of 39. Eliz. c. 9. was made, and some have been since hanged; and within these ten years one Thorold was indicted and arraigned at Newgate upon this statute, for the taking of Mrs. Havers, an orphan, against her will, and marrying her; but he obtained his pardon, and avoided the conviction by this means.

The 3. Hen. 7. c. 2. against forcible marriage, is an existing law; and by 39. Eliz. c. 9. the offence is made felony without clergy.

3. Keb. 193.  
2. Vent. 243.  
1. Hawk. P. C. 171.  
3. Inst. 62.  
1. Vent. 243.  
Kely. 81. and the Case of H. Swendzen, for forcibly marrying Mrs.

Rawlins, 4. St. Tr. 450.

And whereas it is here pretended, that Sarab was married with her consent, and therefore not within the statute, he said, and we all consented thereto, that the taking being unlawful, and against her will, although the marriage was with her will, yet it is felony within the statute.

Forcibly taking a woman, although the subsequent marriage be with her own consent, is

felony.—1. Hawk. P. C. 172.

And they all held, although this was not a marriage *de jure*, because she was in such fear (as she affirmed upon her oath) that she knew not what she answered or did, yet it is a marriage *de facto*, and is felony within the statute. Wherefore judgment was given, that they should be hanged.

A marriage *de facto* is a marriage within 3. Hen. 7. c. 2.

## Hilary Term,

13. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*Sir John Banks, *Knt. Attorney General.*Sir Edward Littleton, *Knt. Solicitor General.*} *Justices.*

## CASE 1.

Kellend against White.

Trinity Term, 13. Car. 1. Roll 1626.

In ejectment, if the defendant plead a prior title by devise and descent, and that he was seised of the land until the plaintiff disseised him, A REPLICATION confessing the seisin, but pleading a fine in bar without answering the disseisin, is bad.

Ante, 324.  
Jones, 402.  
R. 395.  
2. Cr. 44.

**EJECTMENT** of a lease made by *John Arundel* to the plaintiff. The defendant pleaded, that long time before the lessor had any thing to do, *J. Whyte*, grandfather of the defendant, was seised in fee of that land holden in soccage, and devised it to *T. Whyte*, his son, the defendant's father, in tail; who entered, and died seised; which descended to the defendant; whereupon he entered, and was seised in tail, until the said *John Arundel* entered upon him and disseised him, and let to the plaintiff. The plaintiff confesseth the seisin of *J. Whyte*, and the devise in tail; but pleads a fine with proclamation to bar this entail, and conveys title to the lessor of the plaintiff. And upon this plea the defendant demurred.

**MAYNARD** shewed the cause to be, Because the disseisin is the material part of the bar, and the entail is but an inducement thereto; and therefore he ought to confess and avoid the disseisin alledged, or traverse it.

**ROLLE**, for the plaintiff, maintained the replication, Because it conveys a special estate to the defendant, and a descent thereby, and it sufficeth to avoid that entail alledged. And in proof thereof he relied upon *Helier's Case*, 6. Co. 24.

But **ALL THE COURT**, *absente BRAMPSTON*, held, that this replication is vitious; for it is but argumentative, and is no express confession and avoidance, and it ought to answer the material part of the bar, which is the disseisin, and he ought not to answer unto it by argument. And it is not like *Helier's Case*; for there both claimed the same term, which cannot be gained by any, unless by grant; and there entitling himself by a former grant from the same person by whom the defendant claims, it is a good confession and avoidance of the last assignment. Whereupon it was here adjudged for the defendant.

## CASE 2.

Perry against Diggs.

Trinity Term, 13. Car. 1. Roll 402.

Judgment in trover against husband and wife reversed, because the conversion was

**ERROR** of a judgment given at *Marlborough*, where the plaintiff declared in an action of trover against husband and wife, that they converted *ad usum ipsorum*; and after verdict, upon not guilty pleaded, judgment was given for the plaintiff.

stated to be *ad usum ipsorum*. Ante, 254.—1. Roll. Ab. 6. Cro. Jac. 5. Carth. 251. See the Case of *Smally v. Kerfoot*, Andr. 242. 1. Com. Dig. 240.

The

The error here assigned was, That the declaration was not good, because a *feme covert* with her husband cannot convert to the use of the wife, but all is done to the use of the husband.  
For this cause therefore it was reversed.

PERRY  
against  
Diggs.

### Reeve against Digby.

CASE 3.

Trinity Term, 13. Car. 1. Roll 303.

**E**RROR of a judgment in the common pleas in an action on the case, for the disturbance of using his common in a certain place called "THE LAKES;" and shews the prescription of common, and the disturbance by digging forty thousand turfs, and making of a fish-pond.

The defendant pleaded, that he was lord of the manor, and improved the said several parcels according to the statute, having sufficient common in the residue.

Issue being thereupon, the jury found as to the parcel where the digging of the forty thousand turfs was, that the defendant *had not left* to the plaintiff sufficient common, and assessed damages five shillings and costs; and as to the digging of the fish-pond, that the defendant *had left* to him sufficient common. And upon this verdict judgment was given for the plaintiff for the first, which is directly found against the defendant; and for the other part, for digging of the fish-pond, judgment was for the defendant, and the plaintiff *in misericordia*.

The error hereupon assigned was, That this verdict was repugnant, to find that he had not sufficiency of common, and that he had sufficiency of common: wherefore the first finding for the plaintiff is good; and the finding of the second, which is repugnant, is void.—And the judgment, being for the defendant for part, is erroneous.

And of that opinion was BERKLEY, because it is one entire issue. But I held, that the verdict is good enough, for it is *in diversis respectibus*; and it may be he had sufficient common notwithstanding the fish-pond, and had not sufficient in respect of digging the turfs; so the damages to the plaintiff is only by reason of the digging of turf.—And JONES doubted thereof. *Per quod adjournatur*.

In an action for disturbance of common by digging turf and making a fish-pond, on issue whether sufficient common remained, a verdict finding disturbance as to the turfs, and no disturbance as to the fish-pond, is not repugnant; for it is in different respects.

2. Roll. Abr. 695. 702. 717.  
Hob. 73. 262.  
1. Ander 41.  
3. Mod. 72.  
Lach. 93.  
Hardres, 330.  
2. Lev. 140.  
Doug. 377.

### Hughes against Bennet.

CASE 4.

Trinity Term, 13. Car. 1. Roll 1536.

**C**OVENANT. Upon demurrer the case was, *Edward Bennet* Covenant. with *Elizabeth* the daughter of *Hughes*, and such a portion to be paid, to stand seised of such lands to the use of the wife for life, and to the use of the son in tail; and covenants in the said indenture in form following, viz. "THAT he was seised in fee of those lands of a lawful estate in fee, notwithstanding any act done by him, &c.;" and that "the said lands were of the annual value of 200l. *per annum, ultra reprises*." The defendant pleaded, that they were of

Jones, 403.  
2. Ro. 249.



\* HUGHES  
against  
BENNETT.

of the value of two hundred pounds a-year, notwithstanding any act done by him. And hereupon the plaintiff demurred.

It was argued by LANE, *for the plaintiff*, and by ROLLE, *for the defendant*. And, after argument at the bar,

Ante, 107.

B. 30.

ALL THE COURT resolved, that these words, "notwithstanding any act, &c." do not refer to the second covenant, but only to the first part; but the value is properly in the consance of the covenantor; and it was his intent that she should have a jointure of the annual value of two hundred pounds absolutely: and it is not proper to say, that for any thing by him, &c. it should be of such a value; but absolutely that it should be of such a value. Wherefore it was adjudged for the plaintiff.

Easter

## Easter Term,

14. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

}

*Justices.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

### Hall against Marshall.

CASE 1.

*Michaelmas Term, 13. Car. 1. Roll 41.*

**E**RROR of a judgment in the common pleas in *assumpsit*.— On a promise to Whereas the defendant, in consideration of one hundred and permit the thirty pounds paid and secured to be paid, bargained and sold to him, plaintiff quietly to carry away a quantity of 7th March, 9. Car. 1. 1634, all the furzes growing upon such a parcel of land, to be taken before *Michaelmas* 1635; that the defendant, in furzes within a certain time, the omission of al- consideration, &c. assumed to the plaintiff, that he should peaceably ledgering that he without disturbance: and although the defendant had permitted him disturbed him within the time is aided by the verdict. to carry away fifty loads of the said furze, yet he did not permit him to Ante, 209. 420. 2. Jones, 40. 145. 232. to enjoy all according to his promise, but disturbed him from taking one Raym. 487. 2. Roll. Rep. 66. thousand loads of them which were growing upon the land at the Carth. 7. 130. 1. Mod. 169. time of the bargain. Upon *non assumpsit* pleaded, and found for the 3. Mod. 162. 1. Term Rep. 145. 543.

The error assigned was, Because he doth not shew the certain time of disturbance, whether it were before *Michaelmas* 1635, otherwise there is no cause of action.

But ALL THE COURT resolved, that this is no cause of error; for, being after verdict, it is intended that it was within the time, the defendant having pleaded *non assumpsit*, and the cause of the damage appearing upon the trial, otherwise there had been no cause to have damages: and it is not material that the time of the disturbance should be alledged in the declaration; for it is collateral to the promise.— Wherefore the judgment was affirmed.

### James against Tutney.

CASE 2.

*Hilary Term, 11. Car. 1. Roll 753.*

**E**RROR of a judgment in *replevin* in the common pleas; where A custom in a the defendant made conuſance as bailiff to Sir John Stowell, For manor to make bye-laws for the regulation of a that the said Sir John Stowell was seised in fee of the manor of *Somer-* common or great waste, etc. was parcel; and that the said Sir John Stowell, and all those parcel of the whose estate, &c. have had, time whereof, &c. in the said moor a manor, is good. court

JAMES  
against  
TUTNEY.

S. C. Jones, 421.  
1. Roll. Ab. 365.  
2. Roll. Ab. 136.  
Co. Lit. 110.  
Hob. 2. 2.  
Moor, 75. 579.  
584.  
Dyer, 322.  
Carter, 179.  
Palmer, 396.  
5. Co. 63.  
Savil, 74.  
3. Lev. 49.  
1. Burr. 127.

court to be holden twice every year by the steward of the manor; in which court, upon reasonable summons, all the commoners within the said common have used to appear, or to be amerced: and that within the manor is such a custom, that the steward should out of the commoners chuse a jury to enquire of all purprestures and misfeasances within the said common; and that the said jury had used to make ordinances concerning the well-using the common: and that all those who had common had used to be obedient to the performance of those ordinances, under a reasonable pain to be set down by the jury; for which pains forfeited the lord of the manor hath used, time whereof, &c. to distrain: and alleges in fact, that at such a court a bye-law was made by such, being jurors, whereby it was ordered, "That no commoner should keep any sheep in the bounds below the meer, under the pain of three-shillings four-pence:" and for keeping sheep against the said ordinance, and the penalty forfeited, the distress was taken.

Upon this conuance the plaintiff demurred: and judgment being given for the avowant, error was brought.

A bye-law that no commoner shall put his sheep into a particular part of the common is good.

BEAR now assigned for error, FIRST, That this was not a good bye-law to bind one for his inheritance.—But ALL THE COURT held, that an ordinance by custom for the government of the common is good; and this is not to take away the inheritance, but for regulating the common. *Vide* 15. Eliz. Dyer, 314. 5. Co. 62. 21. Hen. 7. pl. 40.

1. Roll. Ab. 365.

1. Com. Dig. 610.

In an action for a penalty under a bye-law, notice of the bye-law need not be alledged.

SECONDLY, Because he doth not shew that the plaintiff had notice of this ordinance.—But it being proclaimed in court, as it was alledged in the plea, he, being a commoner, is bound to take notice thereof; for none else is bound to give him notice.

Ld. Raym. 788.

Carth. 481. 1. Roll. Abr. 365. 468 5. Com Dig. 54. Cowp. 62.

THIRDLY, Because costs are given in this case to the defendant: and it was said, that it is out of the statutes of 7. Hen. 8. c. 4. and 21. Hen. 8. c. 9. being a distress for a penalty.—And of that point

(a) See this point moved again, and argued by

THE COURT would advise (a).

the Judges, post. 533.

#### CASE 5.

The King against Heyward and two Others, his Sureties.

A recognizance for good behaviour is not forfeited by rash, quarrellsome, or unmannerly words, unless they directly tend to a breach of the peace, to terrify others, or to promote sedition.

SCIRE FACIAS upon a recognizance of the good behaviour.—The breach was assigned, FIRST, Because Heyward said to a constable, in executing his office, "Thou art a lying rascal." SECONDLY, Because he said to another who threw down his hedges, "One of you is dead of the plague, and I hope I shall see more of you to die of the plague." THIRDLY, Because he said to a woman, that "she was an whore and jade," and other foul words concerning her incontinency. FOURTHLY, Because he said to one in the church-yard, after evening-prayer, that "he was a forsworn knave," and "a perjured knave." The defendant pleaded not guilty. And upon evidence at the bar, it appeared by one witness that he spake to the constable, because he affirmed that the defendant

Dalt. 284.  
Cro. Eliz. 86.  
Nec. 249.

2. Roll. 227. 229. Palmer, 126. Stiles, 369. Cro. Jac. 412. 498. 4. Bac. Ab. 697, 698 used



used to carry picklocks about him, "Thou art a lying rascal." And the other witnesses on the behalf of the king did not prove that these words were in disturbance of the execution of his office, or for any act about the executing of his office. And for all the other words, they were words of heat and intemperance; but none of them tended to the breach of peace, or to the terror of any; nor was there any act done, but only evil words, and of those words the persons against whom he spake them gave the occasion. And although the manner of speaking may be good cause in discretion to bind one to his good behaviour, yet one being bound, words only which tend not to the breach of peace, or terrifying others, or unto sedition, &c. shall not be sufficient cause of forfeiture of a recognizance, for then by such pretence of words a man should be in danger of his recognizance, which would be inconvenient. Wherefore it was left to the jury to consider of the verity and validity of the evidence, and of the manner of speaking them; whereupon they, being a substantial jury, considering thereof, gave their verdict for the defendant, that he was not guilty. *Vide 2. Hen. 7. pl. 2. 22. Edw. 4. pl. 35. 18. Edw. 4. pl. 28.*

THE KING  
against  
HEYWARD, &c.  
Tremain, P. C.  
613.  
1. Hawk P. C.  
258. 261.  
4. Inst. 180.

## The King and the Informer against Fredland.

CASE 4.

ERROR of a judgment in London upon an information upon the statute of 5. Eliz. c. 4. f. 31. for using a trade wherein he was brought up as an apprentice for seven years, viz. for using the trade of a hemp-dresser. And for this the error was assigned.—And ALL THE COURT held, that this is no such trade as is within that statute; for it is not a trade requiring much learning or skill, and every husbandman doth use it for his necessary occasions, and it is not within the words or intent of the statute. And JONES said, he much doubted of the using the trade of baking and brewing. But it was thereunto answered (to which he agreed) that it extends only to common brewers and common bakers, and not to any who brew or bake in their private houses. Whereupon rule was given (*absente BRAMPSTON*), that judgment should be reversed, unless cause, &c.—NOTE, this was without argument, being conceived to be a clear case.

A hemp-dresser  
is not a trade  
within the  
5. Eliz. c. 4. f. 31.  
8. Co. 130. a.  
11. Co. 54.  
2. Bull. 191.  
Vent. 326.  
Moor, 886.  
Hob. 183.  
Cro Jac. 178.  
Carth. 163.  
Salk. 611.  
L. Ray. 514.  
12. Mod. 311.  
3. Bac. Abr. 552.  
5. Com. Dig.  
572, 573.

## Anonymous.

CASE 5.

ACTION UPON THE CASE, for diverting of an ancient water-course, *qui currere consuevisset et debuisset* to his mill. After not guilty pleaded, and found for the plaintiff,

It was moved by ROLLE, in arrest of judgment, That the declaration was not good, because he doth not shew any title to the water-course by prescription or otherwise.

But GRIMSTON, for the plaintiff, argued, that the declaration was well enough; for being alledged, that it is *antiquus aquæductus*, and that by it the water *currere consuevisset et debuisset*, it compriseth in itself sufficient title, especially against a stranger who diverted it.

In an action for  
diverting an  
ancient water-  
course, it is not  
necessary to  
shew a title by  
prescription or  
otherwise.  
Lut. 125.  
Cro. Jac. 43.  
123. 605.  
2. Vent 292.  
Owen, 109.  
Douglass 683,

4 Mod. 175. 423. Carth. 85. Skin. 316.

And

ANONYMOUS.

And ALL THE COURT being of that opinion, it was adjudged for the plaintiff.

Post. 575.

4 Co. 84. b.

Show 64.

10. Co. 59. b.

Hob. 44.

3. Mod. 49.

3. Lev. 133.

1. Burr. 440.

Afterwards, the same day, another action upon the case for diverting an ancient water-course, *qui ad terram* le plaintiff's *curre consuevisset et debuisse*, to water his land, and for his cattle to drink. After verdict for the plaintiff, SERJEANT HENDEN took the same exceptions, and the same rule was given against him.

Trinity

# Trinity Term,

501

14. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

## Nevison against Whitley.

CASE 1.

DEBT upon an obligation of one hundred pounds, dated 12 July, 10. Car. 1. with condition for the payment of 58l. at the end of six months.—The defendant pleaded the statute of 21. Jac. 1. c. 1. of Usury (*a*), which makes such an obligation to be void, &c. The plaintiff replies, that he lent the fifty pounds for a year, and that the defendant should pay eight pounds for the forbearance for a year, and that the plaintiff should not demand it until the end of the year, and by the scrivener's mistake it was made payable at the half-year's end, and he, not knowing thereof, accepted of the said bond. The defendant rejoins, that the lending was only for half year, and that he was to pay for it eight pounds for that time; and TRAVERSETH, that upon the said twelfth of July it was agreed the loan should be for one entire year, or that he should forbear it for a whole year. And hereupon the plaintiff demurred. *ROLLE, for the plaintiff*, shews, that the bar was ill, because it was not pleaded *quod corrupte aggregatum fuit*, &c. for so is the course of pleading. The plea, that he should have for interest for forbearing, and he doth not say *corrupte*, &c.—And for this cause THE COURT, *absente BRAMPSTON*, held, that the bar was ill, and that the replication is well enough.

Plea of usury to debt on bond must state that the agreement was corrupt. The plaintiff may reply "scrivener's mistake;" but if the rejoinder make the day parcel of the issue where the agreement only ought to have been traversed, it is bad. Jones, 396. 410. Clift 185. 2. Vent. 183. Hard. 418. Cro. Jac. 508. 5. Com. Dig. P. C. 533.

251. 648. 1. Hawk.

SECONDLY, It was objected, that this allegation is against the words of the condition.—But ALL THE COURT held, he might well make such an allegation; for it is the shewing of the true agreement, that no interest was to be paid by the said agreement but such as stood with the law.

THIRDLY, *ROLLE* excepted to the rejoinder, Because he makes thereby the day to be parcel of the issue, which ought not to be, but ought to have traversed the agreement only, and therefore the rejoinder to the bar was ill.

THE WHOLE COURT was of this opinion; but no judgment, because the plaintiff offered to accept his debt, and the defendant offered to pay it.

(\*) See now 12. Ann. c. 16. by which the legal interest is reduced to 5 per cent.

## Lloyd against Gregory.

CASE 2.

EJECTMENT. Upon special verdict the case was, A lease for ninety-nine years being made by a dean and chapter 1. *Edw. 6.* The surrender of an infant lessee by deed is good, if such new lease increase term or decrease his rent.—S. C. Jones, 405. S. C. 1. Roll. Ab. 2. 8. S. C. 2. Roll. Ab. 24. 495. Touch. 281. Co. Lit. 2. 8. Jones, 405. Moor, 105. Cro. Eliz. 220. Perk. 13. 3. Mod. 2. Vent. 203. 3. Atk. 695. 1. Vez. 218. Id. Ray 315. 3. Com. Dig. 165. 5. Com. 511. 514. 1. Bl. Rep. 578. 1. Term Rep. 444.

The surrender of an infant lessee by deed is

good, if such new lease increase term or decrease his rent.—S. C. Jones, 405. S. C. 1. Roll. Ab. 2. 8. S. C. 2. Roll. Ab. 24. 495. Touch. 281. Co. Lit. 2. 8. Jones, 405. Moor, 105. Cro. Eliz. 220. Perk. 13. 3. Mod. 2. Vent. 203. 3. Atk. 695. 1. Vez. 218. Id. Ray 315. 3. Com. Dig. 165. 5. Com. 511. 514. 1. Bl. Rep. 578. 1. Term Rep. 444.

to

K k



LLOYD  
against  
GREGORY.

to begin AT the Feast of the *Annunciation* after the end of a lease of fifty years made 35. *Hen. 8.*; this lease being assigned to *John Shephard* and *William Shephard*, infants of eleven years of age, they 29. *Eliz.* which was before the end of the term for fifty years, take a new lease of the same lands from the dean and chapter, for the same term, and for the same rent, and upon the same covenants; and after the end of the said term for fifty years, the infants, being of full age, enter, and hold by that second lease, and pay the rent accordingly to the dean and chapter, which they accept for divers years; and afterwards a new dean and the chapter cause the entry to be made, to avoid this lease, and let it to the defendant, who entered and ousted them who were infants, and made a lease to the plaintiff, &c.

This was argued by *WHITWICK* for the plaintiff, and by *MAYNARD* for the defendant.

THE FIRST QUESTION was, Whether an infant may surrender future interest by the taking a new lease? for if he had actually surrendered, it had been void, being but an interest of a term.—And for that point ALL THE COURT held, that a surrender by an infant cannot be by deed, but it is absolutely void (a); and that a surrender by acceptance of the second lease is void, because it is without increase of his term and decrease of his rent; and where there is not an apparent benefit, or the semblance of a benefit, his acts are merely void; and here is no benefit or appearance of any to the infant for he hath no manner of advantage thereby, but cause of quarrelling by this lease (b).

(b) See *Zouch*  
v *Abbot*,  
3 *Burr.* 1806.

Lord Mansfield's Observations on the Report of this Case.

A lease AD  
*Festum*, &c.  
after the deter-  
mination of a  
former lease,  
is as good as if  
it had been  
a *festo*, &c.  
3 *Bac. Ab.* 344.  
5. *Com. Dig.*  
513.

(c) Ante, 399.

SECONDLY, Whereas it was objected, that it doth not appear that the infants had a lease for ninety-nine years; for it is mis-recited in the grant, viz. the grant mentions the lease for ninety-nine years to commence AD *Festum Annuntiationis* after the lease for fifty years is determined, and it ought to be A *Festo Annuntiationis*;—THE COURT held it to be all one, for there shall be no fraction of a day, and shall begin instantly from the determination of the former lease. And it is not like the case of *Miller v. Manwaring* (c), where there was a recital, that a lease was made 28. *Hen. 8.* for years, and the lease was granted, &c. whereas in truth it was dated 28. *Hen. 8.* and there is a whole year's difference, and no such term. Wherefore was adjudged for the plaintiff (d).

(a) By 29. *Geo. 2.* c. 31. in all cases where any person under the age of twenty-one years is interested in or entitled to any lease for life or years, he or his guardian may apply to any of the courts of equity by petition or motion in a summary way, and by deed may be enabled to surrender such lease, and to accept a new

lease of the premises comprised in the lease so surrendered, &c. &c.

(d) See *Hal MS.* note 4. *Co. Lit.* 43. where it is said to have been adjudged in this case, that a lease by A. dean of and his chapter, not warranted, is void immediately against A. himself, because the corporation is aggregate.

CASE 3.

Arundel against Sanders.

Hilary Term, 13. Car. 1. Roll 1266.

Tender of marriage in action on the case "in amore matrimonii," is not traversable; but it must appear the ancestor was seized in fee.

TRESPASS upon the Case brought by bill in the king's bench supposing that the defendant's father held of him such land knight's service, and died in his homage, his heir within age; and

that he tendered to him a convenient marriage, and shews what, &c. and demanded of him the value of the marriage, &c. The defendant, *protestando* to the tenure *pro placito*, traverseth the tender, &c. And hereupon the plaintiff demurred.—And IT WAS RESOLVED that the plea was ill, for the tender is not traversable.

ARUNDEL  
against  
SANDERS.

2. Bl. Com. 89.  
Cro Jac 66.

150, 151. 5. Co. 127. b.

But BEAR, for the defendant, moved, that the declaration is ill, Because he declares in an action upon the case, where it ought to be in *valore maritagii*.—And THE COURT doubted of this point, because there is a special original writ *de valore maritagii*. But JONES conceived, that action upon the case is maintainable. As an action upon the case lies for an escape as well as action of debt, so here it may be the one way or the other.

ANOTHER EXCEPTION was taken to the declaration, Because it is not shewn that the ancestor was seised in fee of the land supposed to be held, &c.—And that was conceived to be a material exception (a).  
—*Et adjournatur*.

(a) By 12. Car. 2. c. 24. the *valor maritagii* is taken away.

### Middlemore against Goodale.

CASE 4.

COVENANT. Whereas the defendant by indenture enfeoffed *J. S.* of such lands, and covenanted for himself and his heirs with the feoffee, his heirs, and assigns, to make further assurance upon request; which lands *J. S.* conveyed to the plaintiff, who brings this action, because the defendant did not levy a fine upon the plaintiff's request;

The defendant pleaded release from the said *J. S.* with whom the first covenant was made, and it was dated after the commencement of this suit; and thereupon

The plaintiff demurred.

And ALL THE COURT agreed, that the covenant goes with the land, and that the assignee at the common law, or at leastwise by the statute, shall have the benefit thereof.

SECONDLY, They held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant. But the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action wherein the assignee is interested. Whereupon rule was given, that judgment should be entered for the plaintiff, unless cause was shewn to the contrary by such a day (a).

If a man covenant with another, his heirs, and assigns, to make further assurance, it runs with the land, and the assignee shall have benefit of it.

1. Roll Ab 521.  
2. Com. Dig. 562  
3. Term Rep. 393.

In covenant by an assignee, the defendant may plead a release from the covenantee for a breach in the time of the assignee, but not if the release was given after the action brought.

Ante, 137.

1. Roll. Ab. 521. 2. Roll. Ab. 411. Cro. Jac. 511. 2. Lev. 206. 3. Lev. 154. Co. Lit. 125. Allen, 39. Dyer, 57. 3. Leon. 69. 2. Will. 376. 5. Com. Dig. 235. 2. Ch. Cal. 169.

(a) Judgment was given for the defendant. Post, 505.

### Harrison's Case.

CASE 5.

THOMAS HARRISON was indicted, For that on the 4. May, 14. Car. 1. while the courts of common pleas, king's bench, and chancery, were sitting, he rushed to the bar of the common pleas, and in disturbance of the Justices and of the court and administration of Justice sitting therein, is a high misprison, for which the offender may be indicted, fined, expelled, and imprisoned. Ante, 175.

To disturb courts of justice by threatening or reproaching words to any

HARRISON'S  
CASE.S. C. Hutton,  
131.

1. Sid. 271.

Cro. Car. 175.

503.

Poph. 153.

1. Hawk. P. C.

88. 354.

4. Bl. Com. 126.

(a) 5. Co. 125.  
Fort. 101.

of justice, and against the king and his regal majesty, *palam et publice et malitiose* intending to draw JUSTICE HUTTON, one of the Justices of the common pleas, into displeasure of the king and of other his subjects, and to bring him into danger of his life, and forfeiture of his life and goods, spake these words of him the said JUSTICE HUTTON, in the presence and audience of the Justices there sitting: "*I accuse MR. JUSTICE HUTTON of high treason.*"

The defendant pleaded "*Not guilty,*" and by a jury of knights and esquires was found "*Guilty,*" he confessing (a) that he spake those words purposely and openly, because JUDGE HUTTON, in his argument in the exchequer-chamber, maintained, that the king might not charge his subjects to find ships, and that therein he denied his supremacy; and by this means he stirred up the subjects to sedition against the king.

The judgment was, that he should pay a fine to the king of five thousand pounds, be imprisoned during the king's pleasure, have a paper upon his head shewing his offence, and go therewith to all the courts of *Westminster*, and make his submission in every court in *Westminster-Hall* and in the *Exchequer*, for it is an offence to every court (a).

(b) MR. JUSTICE HUTTON brought an action against him in the king's bench for defamation; and recovered 10,000l.

KEELING, *Clerk of the Crown*, informed the Court, that imprisonment during the king's pleasure is usually entered, and not imprisonment during life, except where there is an awarding of forfeiture of lands during life.

damages.—Hut. Rep. 131.

## CASE 6.

## The Marquis of Winchester's Case.

Judgment of recusancy may be reversed for any defect in the record itself that tends to the king's prejudice, as the omission of a *capiatur*, &c notwithstanding the words of 3. Jac. 1. c. 4. f. 16. Ante, 465. 8. Co. 59 a. Raym. 434. 11. Co. 59. 63. 1. Roll. 95. Cro. Jac. 211. 480. 482. Shower, 309. 3. Keb. 591. 5. Mod. 141. 2. Bac. Ab. 192. 1. Hawk. P. C. 25.

ERROR to reverse a judgment for the king upon an indictment against him by the name of Lord St. John, for recusancy, for his absence from church for two months; whereupon he appearing, and pleading not guilty, it was found by verdict, that he was guilty for the absence of one of the months, parcel of the time, and not guilty for the other month; wherefore it was adjudged that he should forfeit twenty pounds, and for the other month eat *carceris sine die*; and the King's Attorney signified his majesty's pleasure, that if it were erroneous, it should be reversed. And ROLL assigns divers errors:

FIRST, That the indictment is *apud Gossrum Winton*. and he doth not say in what county or parish *Winton* is.

SECONDLY, It is *coram JOHN FINCH, &c. Justiciariorum de guerra deliberand.* and he doth not say, *Justiciariorum ad assisas et ad gubernandum.*

THIRDLY, Because the indictment is against him by the name of *Dominum ST. JOHN's*, without other addition.

FOURTHLY, Because the indictment is, *quod non accessit ad ecclesiam parochialem prædict.* and there is not any church mentioned before.

And THE COURT held, that none of the exceptions were material; and it was doubted whether any exception be good upon conviction of recusancy; for the statute of 3. Jac. 1. c. 4. f. 16, 17. precise, that it shall not be void or discharged for default of form or other matter, until after conforming himself by coming to the church.



But afterwards, because the judgment was not *ideo capiatur*, and the omission thereof is apparent to the king's prejudice, and for that, upon every conviction in indictment, the judgment is *quod capiatur*; for this cause the judgment was reversed.

1. c. 4 f. 16. 1 Show. 309. 5. Mod. 141. 1. Hawk. P.C. 25.

Middlemore against Goodale.

CASE 7.

*Vide ante, Page 503.*

BEAR, for the defendant, moved this Case again. And he took exception to the declaration, That it was not good, because he brings the action as assignee of assignee of the covenantee; and shews, that the conveyance was made to the plaintiff and Frances his wife, and to the heirs of the husband: and he brings the action sole without naming his wife, who is yet alive, so it is not good; for he ought to have joined his wife with him in the action.—And ALL THE COURT, *absente* BRAMPSTON, were of that opinion. Whereupon judgment was given for the defendant, *quod querens nihil capit per billam*.

If lands be conveyed with a covenant of further assurance, and afterwards assigned to husband and wife, they must both join in an action on the covenant. Ante, 348.

S.C. Jones, 406. Term Rep. 627.

1. Can Dig 572. 1. Roll. Abr. 348. Cro. Jac. 399. 3. Bulst. 164. Dougl. 329. 3.

Mann against the Bishop of Bristol, Robert Hide, and Richard Hide, Incumbent.

CASE 8.

*Easter Term, 14. Car. 1. Roll 467.*

QUARE IMPEDIT in the common pleas for the church of *Weston Fitz-pain*, in the county of Dorset.

Jones, 407. 2. Roll. 49.

The plaintiff entitles himself to the advowson, For that *Margaret Chubb* was seised in fee of the manor of *Wootton Fitz-pain*, to which manor the advowson was appendant, and upon the 12th September, 10. Jac. 1. let it to *Robert Cook* for years, *à die datus*: that on the 13th September, 20. Jac. 1. he entered and was possessed: and that *Margaret* by indenture the 13th September, 20. Jac. 1. granted the reversion to *William Bishop* and others, to the use of the said *Margaret* for her life, and after to the use of *Joan Cook* and the heirs of her body: that afterward *Margaret* died, and *Joan* entered, and leased a fine to the said *John Mann* of the said manor, to which the said advowson was appendant; whereupon at the next avoidance the plaintiff presented, &c.

The defendant *Robert Hide* confesseth the seisin in fee of the said *Margaret*, and that she infeoffed him of the manor, to which the advowson was appendant, whereby he presented, &c.; and traverseth the grant of the reversion *modo et forma, &c.*; and issue was taken thereupon.

*Richard Hide*, as incumbent, pleads, and entitles himself, For that *Margaret Chubb* being seised in fee on the 4th August, 19. Jac. 1. her deed granted to *Robert Jacob* the first and next avoidance; and that *Robert Jacob* died and made such a one his executor, who presented the next avoidance to the said *Robert Hide*, who presented hereto the defendant *Richard Hide*; and the issue upon this plea was *non concessit*.

1. Com. Dig. 284.

The jury upon these issues found a special verdict. On the first issue, they find the lease and grant of the reversion, and that it was the use of the said *Margaret* during her life, and after to the use of

MANN  
against  
The BISHOP of  
BRISTOL and  
OTHERS.

of *Robert Cook*, until *Joan Cook* came to the age of twenty-one years; and after to the use of *Matthew Chubb* and *Joan Cook*, and the heirs of the body of *Joan* by the said *Matthew* to be engendered; and after to the use of the said *Joan* and the heirs of her body; and after to the use of *Robert* and his heirs. And they find, that *Joan* accomplished her age of twenty-one years before this action brought, and that *Matthew* died without issue of the body of the said *Joan*; and that upon the 4th August, 19. Jac. 1. *Margaret* granted to the said *Robert Jacob*, "*durante vitâ ipsius ROBERTI, primam et proximam advocacionem, &c.*" and that he died before the church became void.

The question was, Whether this were an absolute grant of the next avoidance, as it was pleaded, or not?

IT WAS ADJUDGED in the common pleas, *for the plaintiff, quid non*: and this judgment was here affirmed; for it is not an absolute grant of the next avoidance, but it is limited to him to present to the advowson, if it becomes void during his life, and not that otherwise it should go to his executors.

HOLBORN, *for the plaintiff* in the writ of error, moved, that the issue being upon the grant of the reversion, Whether it were granted *modo et formâ prout*? the verdict found, that it was granted to the use of *Margaret* for life, and after to the use of, &c. *ut supra*: and although it be found that the estates were determined before the action brought, yet it should have been shewn; for there is no such grant, *modo et formâ prout*.

BUT GRIMSTON, *for the defendant*, argued, that these estates being determined need not be mentioned, especially in this possessory suit, the question being only for an avoidance fallen: and although the traverse be found, *quod concessit modo et formâ*, that extends not to the uses limited, but *non concessit reversionem modo et formâ prout*; and it is found, *quod concessit reversionem modo et formâ*, and the estates determined need not be mentioned; as 14. Edw. 4. pl. 1. feoffment to three, the one dies, it may be pleaded to be made to the survivors, not mentioning him that is dead.

ALL THE COURT being of that opinion, the judgment was affirmed.

## CASE 9.

## Evans and Cottington's Case.

Precedent of  
punishment  
inflicted upon  
rioters.  
Cowp. 61.  
Dalt. 46.  
2. Roll. b. 208.  
Dalt. c. 88.  
2. Hale, 155.  
1. Hawk. 298.

EVANS and *Cottington* and seven others were indicted for a riot, that they, with others there named; to the number of one thousand persons, made a rescue and assault upon *Henry Smith*, bailiff, who by virtue of a warrant upon a bill of *Middlesex* against *William Cleer*, had arrested him, and was carrying him to prison, and they procured him to escape. The arrest was at *Charing-Cross* in the parish of *St. Martin's*, in the county of *Middlesex*; and after the arrest, they assaulted the bailiffs and beat them: and the bailiffs putting the prisoner into a house for safe-keeping against the tumult, they assaulted the house; and notwithstanding a justice of peace, assisted by three constables, made proclamation for keeping the peace, and for their departure, yet they continued their assault, breaking open the house, and with ladders taken from the king's house at *Whitehall* (where the king with his court were resident), upon the twenty

twenty-fourth of *March*, 13. Car. 1. in the afternoon of the said day, made this riot and rescous, and carried the prisoner away through the king's house, and caused him to escape (a).

EVANS and  
COTTINGTON's  
CASE.

Upon this indictment nine of them being arraigned pleaded not guilty, and four of them, viz. *Evans*, *Cottington*, *Thomas Groom*, and *Heatley*, were found guilty, and five of them were found not guilty; but against three of them there was probable evidence, that they were aiding to this riot and rescous, but the jury acquitted them.

See the case of  
Rex v. Royce,  
4 Burr. 2073.

Wherefore because it was so great a riot and offence, being committed so near the court, it was adjudged, that the said four persons, which were so convicted, should be committed to prison, and every of them should pay five hundred pounds fine to the king, and that every of them should stand on the pillory at *Westminster* and *Charing-Cross*, where the riot was done; and that *Thomas Groom*, who was a robber, and entered into the house with a drawn sword and a kettle upon his head as an helmet to defend himself, should stand upon the pillory with a sword in his hand and a kettle upon his head, and should be bound with good sureties for their good behaviour before they should be delivered: and the three which were acquitted, against whom was such probable evidence, were bound to find sureties for their good behaviour.

By the common  
law riots and  
routs, when of  
an enormous  
nature, may be  
punished not  
only by fine and  
imprisonment,  
but by pillory.  
Dalt. c. 46.  
2. Roll. Ab. 208.  
1. Hawk. P. C.  
298.

(a) See the Riot Act, 1. Geo. 1. c. 5.

### Thomas Barkham's Case.

CASE 10.

THOMAS BARKHAM, upon a *habeas corpus* awarded to the Warden of the Fleet, was brought to the bar; and it was returned, that he was committed 11th *November* 1637 by warrant from the Lords of the Council to the Fleet, to remain there until other order given.—And for that there was not any cause of commitment mentioned either in the *mittimus* or return, THE COURT conceived he ought not to be detained in prison; whereupon he was bailed.

The king's  
bench will bail  
upon a commit-  
ment by the  
privy council  
where no cause  
is expressed.  
Ante, 133. 168.  
Post 579. 552.  
2. Willf. 195.

3. 2. Cro. 81. 219. See 2. Hale, 144. 2 Hawk. ch. 15. f. 70. 2. Bl Rep. 756.

### Lawson's Case.

CASE 11.

ONE Lawson, at the same time, upon another writ of *habeas corpus* to the Warden of the Fleet, and returned, that he was committed 4th *May* 1638, by the Lords of the Council, and no cause shewn, was therefore let to bail.

The return to a  
*habeas corpus* must  
shew the cause  
of commitment.  
Ante, 133.

Ante, 579. 593.—2. Inst. 55. Vaugh. 137. Palm. 558 3. Com Dig 456. 2. Hawk. P. C. 169. 185.

### Smith against Smith.

CASE 12.

ASSISE of a rent-seck in the county of *Cambridge*. Upon a special verdict the case was, That a rent-seck was granted of four pounds a-year by *John Smith* to *Nathaniel* his son in fee, issuing out of an house called the *Unicorn*, in *Lynton*, payable at the *Annunciation* and *St. Michael* at the house of the said *Nathaniel*, in *Lynton*, to begin at *Michaelmas* after his decease, and gave sixpence in name of *feisin*, and for rent due at the *Annunciation* 1637, and six years before, and not paid, &c.

A demand and  
non-payment of  
rent at the house  
out of which it  
issues, is a dis-  
feisin of the rent,  
although by the  
grant it was  
made payable at  
another place,  
The Post. 521.



SMITH  
against  
SMITH.

Bendl. 59.  
Plowd. 71.  
4. Co. 73.  
7. Co. 57.  
Cro. Eliz. 324.  
Co. Lit. 161. b.  
202.  
1. Roll. Ab. 427.  
Hob. 207.  
4. Bac. Ab. 356.

The jury find the grant of the rent and seisin given, and the demand at the said house called THE UNICORN, at the said Feast of the *Annunciation* 1637, and that none was there to pay it. The question was, Whether this were a disseisin for the rent arrear?

The doubt was, Whether it were a good demand for the rent at the Feast of the *Annunciation*, at the house out of which it was issuing, and not at the house where it was payable?

And it was resolved by the CHIEF JUSTICE and MYSELF, being Justices of assize, after advice had with other of the Judges, who were of the same opinion, that it was a good demand, and a disseisin for not payment; and that this gift of sixpence in name of seisin was good seisin: and the jury found all in damages, viz. twenty-four pounds, not mentioning it to be for arrearages of rent: and it was well enough, for the precedents warrant both ways. Whereupon it was adjudged for the plaintiff. *Vide Co. Lit. 153. b. 7. Co. 18. 29. 2. and the Book of Entries, fol. 78. & 79. Hil. 45. Eliz. rot. in Cam. Banc. Midd. Assize for a Rent-seck.*

See 4. Geo. 2. c. 28.

Michaelmas

# Michaelmas Term,

14. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

## Anonymous.

### CASE 1.

**T**RESPASS against husband and wife for breaking his close.

After verdict for the plaintiff, the husband died betwixt the day of *nisi prius* and day *in banco*.

ARCHIBALD now moved, that no judgment should be entered; for the husband being dead, the action as to the wife is by the act of God abated: and for that cited 6. *Edw.* 3. pl. 295. 11. *Hen.* 7. pl. 6.

And it was held by ALL THE COURT, that the death of the plaintiff or defendant, after verdict by *nisi prius* and before the day *in banco*, shall abate the writ or bill: and although husband and wife be but one person in law, yet forasmuch as the husband is dead before the day *in banco*, no judgment may be entered; and if it be entered, it is error.

But because this is an action of trespass which is but personal, and is joint and several, THE COURT doubted; for it is clear, if the wife had been dead, and the husband survived, judgment should have been entered against him: and the reason is the same, that the surviving should be chargeable for the trespass. But whether the bill shall abate, THE COURT would advise; *per quod adjournatur*.

See 17. Car. 2. c. 8. and 8 & 9. Will. 3. c. 10.

In trespass against baron and feme, if the baron die betwixt the *nisi prius* and day *in banco*, the writ shall be good against the feme. *Ante.* 232. *Post.* 574. *Cro. Jac.* 19. 356. 646. 1. *Sid.* 131. 143. 3. *Leon.* 5. 2. *Stra.* 1063. *B. R. H.* 395. 1. *Will.* 124. 302. 2. *Mod.* 115. *Carth.* 415. 1. *Com. Dig.* 36. 78. 1. *Bac. Ab.* 10. 4. *Bac. Ab.* 39.

## Ceely against Hoskins.

### CASE 2.

Hilary Term, 13. Car. 1. Roll 696.

**E**RROR of a judgment in the common pleas in an action for these words: "Thou art forsworn in a court of record, and that I will prove." After verdict, upon not guilty, and found for the plaintiff, the defendant there moving that these words are not actionable, and judgment being there given for the defendant, a writ of error was brought and assigned in point of judgment.

ROLLE, for the plaintiff in error, moved to have the judgment reversed, Because the words are very slanderous; and as much as if he had said, "He was a perjured person."

But MAYNARD, for the defendant in error, said, That it had been much debated in the common pleas, and the Court there agreed, that the action would not lie; and he conceived the reason to be, because he did not say in what court of record he was forsworn; nor

"Thou art forsworn in a court of record" are actionable, without stating in what court; and, after reversal, the court of error will give judgment. 1. *Roll. Ab.* 42. 774. *Salk.* 262. 407. 2. *Saund.* 256. 1. *Lev.* 310. *nor Carth.* 181.

CEELY  
against  
HOSKINS.

nor that he was forsworn in giving any evidence to any jury: and it may be that he intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record.

But JONES, BERKLEY, and MYSELF held clearly, that the action well lay; and such foreign intendment as MAYNARD pretended shall not be conceived; and it shall be intended that he spake these words maliciously, accusing him of perjury, and for a false oath taken judicially upon judicial proceedings in a court of record, and shall be understood according to the common speech and usual intendment; as to say, such a one is "a murderer" (not speaking whom he murdered, or when); an action lies; and it shall not be intended that he was a murderer of hares, unless such foreign intendment be discovered or shewn in pleading. Wherefore they all held, that the judgment is erroneous: but because BRAMPSTON was absent, they would advise.—And afterwards the judgment was reversed, and the plaintiff recovered.

### CASE 3.

### Morley against Pragnell.

Trinity Term, 14. Car. 1. Roll 549.

A tallow-furnace erected in the neighbourhood of other houses is a nuisance.

2. Roll. Ab. 139.

Hutt. 136.

Palm. 536.

Vent. 26.

Keb. 500.

3. Bl. Com. 217.

Salk. 458. 460.

Ld. Ray. 1163.

1. Com. Dig.

214.

Strange, 704.

1. Burr. 333.

1. Hawk. P. C.

ch. 75. f. 10, 11.

**ACTION ON THE CASE.** Whereas the plaintiff is owner of a common inn in *Eastgestock*, that the defendant maliciously erected a *tallow furnace*, and boiled therein much stinking tallow, to the great annoyance of him and his guests; and by reason of such stench, arising thereupon, many of his guests left his house, and many of his family became unhealthful. Upon not guilty pleaded, a verdict was found for the plaintiff.

GERMYN, *Serjeant*, moved in arrest of judgment, that an action lies not, for he, being a tallow-chandler, ought to use his trade, which cannot be said to be a nuisance.

But ALL THE COURT held, that as the declaration is penned the action is maintainable; for every one ought *sic uti suo, quod alienum non lædat*: then when the plaintiff is an inn-keeper, the defendant erecting a tallow-furnace annoyed his house with stench, especially by boiling stinking stuff: and so in *Tobayles's Case*, who erected a tallow furnace across the street of *Denmark-house* in the *Strand*, it was found a nuisance upon the indictment, and adjudged to be removed.—Whereupon judgment was here given for the plaintiff.

### CASE 4.

### Jeffries against Payhem.

Trinity Term, 14. Car. 1. Roll 528.

In slander words shall be construed according to their common acceptance.

Ante, 122. 260.

227.

Post. 516.

4. Co. 13. 19.

1. Roll. Ab. 129.

**ACTION** for these words of the plaintiff, being an attorney: "he is a base cheating cozening knave, and hath cheated me as never any man was cheated."

The question was, Whether an action would lie for these words? for if he had not shewn that he was an attorney, an action would not have lien; and as it is laid barely without any circumstance, it doth not appear that it toucheth him in his profession.

THE COURT therefore would advise.

Cro. Jac. 158 156 Sayer, 265. Ld. Raym. 959.

The



## The King against Sir John Dryden and three Others.

CASE 5.

ON a writ of right of advowson the parties being at issue, and put upon the grand assise, there issued thereupon a *venire facias*, to return *quatuor milites*, that they *cum seipsis* should return twelve others, who, with the said four, should make a jury returnable *Ostabis Michaelis*. Upon the day of essoins, viz. 16th October, 14. Car. 1. the demandant appeared and prayed, that the tenants be demanded: and before BERKLEY, Justice, who only kept the essoins, the tenants being demanded, James Turlow, their attorney appeared; and the demandant prayed, that their default might be recorded, for they ought to appear in person.—BERKLEY, Justice, held, that they might well appear by their attorney, who was admitted before upon the record.

Afterward he prayed for the tenants, that they might be essoined; which being contradicted by the plaintiff, BERKLEY, Justice, caused the prayer to be entered.

Afterward the four knights being called appeared, and they were appointed to chuse others to them; and there being a question about the number, they were appointed to chuse twenty to them to make a number complete (as the clerks said was the course.)

BUT NOW being moved in full Term, it was resolved,

FIRST, That the tenants may appear by attorney.

SECONDLY, That the essoin cast was not allowable, because the appearance by their attorney was entered and recorded; and if an essoin would lie, it should be as well cast for the attorney as for the tenants: and when an appearance by their attorney is recorded, they cannot at the same time be essoined; wherefore for this cause the essoin cast was disallowed.

THIRDLY, The question was, Whether this *essier* of twenty to the four knights be good; or, whether they ought to chuse and return twelve only; and if there ought to be twelve only returned, whether the return of twenty makes not the whole return void; or that it shall be good for the twelve, and surplusage for eight?—Hereof THE COURT would advise (a); and, Whether there might be any challenge against any of the four knights (b), because no exception was taken against them the first day? Vide 15. Edw. 4. pl. 1. 39. Edw. 3. pl. 2. 7. Hen. 4. pl. 2. 22. Edw. 3. pl. 18.

(a) In S. C. 2. Roll. Ab. 674. it is said, the Court held the return good.

(b) See 24. Geo. 2. c. 18. by which this cause of challenge is taken away. See also on this point 2. Hawk. P. C. 580.

## Mulcarry and — against Eyres and Others.

CASE 6.

Michaelmas Term, 3. Car. 1. Roll 333.

ERROR of a judgment in the king's bench in Ireland, in an ejectment of a lease by the Earl of Tumond of forty messuages, five hundred acres of land, forty acres of meadow, two hundred acres of pasture, one hundred of BOG, and one hundred acres of BRUERY, in the villages and territories of D. S. and V.

Upon not guilty pleaded, a special verdict was found, That the Earl of Tumond, being seised in fee, let it to the plaintiff for one-and-twenty years, rendering rent, with condition that he should not let or alien any part above three years; and if he did, that the lease

In a writ of right the tenant may appear by attorney; and an essoin cast, if it can be cast in this case, is void after appearance recorded; but *quare*, Whether the four knights on the grand assise may be challenged; or, whether they may elect more than twelve companions? See the continuance of this case post 574. 583. 585. 589.

Moor, 67. Co. Lit. 159. a. note (2). Booth on Real Act. 96, 97.

On a condition, that a lessee shall not assign without licence, if the lessor, after notice of an assignment without licence, accept of rent from the assignee, he dispenses with the condition.

MULCARRY  
and —  
*against*  
EYRES and  
OTHERS.

1. Roll. Abr. 476. 774.
3. Co. 64.
- Co. Lit. 52. 215.
- Cro. Eliz. 553. 572.
- Cro. Jac. 398.
2. Leon. 134.
- Poph. 25. 53.
1. Burr. 139.
- Cowp. 482.
2. Term Rep. 425.

Ejectment will be in Ireland for so many acres of bog  
Post. 555.  
Doug. 305.

Ejectment for land lying in such villages and territories is good.

The writ of possession on reversing a judgment in ejectment from Ireland, is to be  
4. Burr. 2156.

lease should be void, and he re-enter : and he let for three years ; and so from three years to three years, during the term of his life, if he lived so long : and the earl, after this assignment, accepted the rent due from the assignee, and notwithstanding re-entered, and made this lease to the plaintiff : and the defendant re-entered.

The questions made in Ireland upon this lease were, FIRST, Whether it were a breach of the condition ? SECONDLY, Whether the acceptance of the rent by the hand of the assignee makes it good, and dispenseth with the breach, especially the acceptance being at another rent-day ? And it was resolved *there*, and adjudged for the defendant.

BUT THE COURT *here* resolved, that it was a plain breach of the condition, and the acceptance after might not dispense with the condition, seeing it was that it should be void ; so it was absolutely determined.

GRIMSTON then took an exception to the declaration, That one hundred acres of *bog* was not good ; for there is not any such word known : but it was held to be an usual word there and well known (a) ; and if it were not, yet the plaintiff might release his demand as to that land, and have his judgment for the residue.

ANOTHER EXCEPTION taken by him was, Because it was in *villis et territoriis*.—But it was held to be well enough, for they be of the same sense ; and if not, it is but surplusage for *territoriis*.

Whereupon rule was given, that judgment should be reversed, unless other cause were shewn.—And afterwards being moved again, the judgment was reversed ; and judgment given for the plaintiff, *quod recuperet terminum suum prædictum*.

It was moved how the *habere facias possessionem* should be awarded ; —AND RESOLVED, that there should be a writ directed to the CHIEF JUSTICE in Ireland to reverse that judgment, and commanded to award execution (b).

directed to the CHIEF JUSTICE. 2. Saund. 256. Cro Jac. 533. Yelv. 118. 5. Com. Dig. 303.

(a) Strange, 71. it will lie for a mountain in Ireland, or for alder car in Norfolk. Stra. 1063. 1034. 1. Burr. 139. 623. 5. Com. Dig. 273, 274.

(b) By 22. Geo. 3 c. 53. and 23. Geo. 3. c. 28. no writ of error or appeal shall

be received or adjudged, or any other proceedings be had by or in any of his majesty's courts in this kingdom in any action or suit at law or in equity instituted in any of his majesty's courts in Ireland.

#### CASE 7.

Thomas Smith *against* Richard Cooker.

Trinity Term, 14. Car. 1. Roll 1499.

An action will lie by husband alone, for saying, "Thou and thy wife are witches, and have bewitched my mare," innuendo the mare of "the plaintiff," instead of "the defendant"

S. C. Jones, 409.  
1. Roll. Ab. 84.

**A**CTION for these words of the plaintiff : "Thou and thy wife," innuendo the plaintiff and Agnes his wife, "are both witches, and have bewitched my mare," innuendo the mare of the said Thomas, where it ought to have been "the mare of the said Richard."

After verdict, upon not guilty, for the plaintiff, it was moved in arrest of judgment for the defendant, Because that two cannot commit one witchcraft ; also it cannot be the mare of the plaintiff and the mare of the defendant, as *prædicti* THOMÆ imports.

*Sed non allocatur* : for the words ought to be referred as they were spoken, viz. that both of them bewitched my mare ; and "both"

Cro. Jac. 202. Dyer, 19. Gouldf. 76. 1. Bac. Abr. 33. 4. Bac. Abr. 10.

referre

refers to each of them, that they had severally committed the offence : for if a man saith to two, " You both have murdered J. S." each of them shall have his action severally, and not jointly, as THE YEAR-BOOK 28. Hen. 8. pl. 19. is : and for the last words, *innuendo* the mere of *Thomas*, *Thomas* is repugnant to the precedent words, &c. Therefore judgment was given for the plaintiff.

SMITH  
against  
COOKER.

## Anonymous.

## CASE 8.

TRESPASS of assault and battery against husband and wife for a battery done by the wife. The defendants being found guilty, the question was, Whether a *quod capiatur* should be entered against husband and wife ?—And IT WAS RESOLVED, that a *quod capiatur* shall be against the husband only. And KEELING, Clerk of the Crown, and HODSDEN, the Secondary, informed the Court, that so were all the precedents, although the wrong is only done by the wife.

Judgment against husband and wife for a battery by the wife, the *capias* shall be against the husband only.  
Ante, 407. *capias*.

Cro. Jac. 203. 223. Moor, 704. Stra. 1167. 1237. 3. Bl. Com. 414. 1. Willf. 149. 1. Crompt. Prac. 348.—See 5 & 6 Will. & Mary, c. 12. Carth. 390. 5. Mod. 285.

## Kemp against Barnard.

## CASE 9.

Hilary Term, 13. Car. 1. Roll 1252.

UPON a special verdict the question was, Whether a lease by the king, under the exchequer-seal, of lands usually demised to one for life, remainder for life, remainder to a third for life, reserving the usual rent, shall be good or not ?

A lease for years of crown lands under the exchequer-seal is good.

MAYNARD, for the defendant, very much urged, that it could not be but under the great seal; for a freehold cannot pass from the king but by patent under the great seal.

Post. 528.  
Ante, 100. 173.

But ALL THE JUSTICES held, that leases for life under the exchequer-seal, being of lands usually leased, and reserving the ancient rent, are allowable and good for the king's benefit, that his land shall not lie unletten.—And JONES affirmed, that all the Barons of the exchequer said, that it was their course to demise as well for life as for years, and it hath always been so allowed; and of their course there this Court shall take cognizance, as it is in *Lane's Case* (a).—And for this cause rule was given, that judgment should be entered accordingly, unless, &c.

2. Roll. Ab. 182.  
Cro. Jac. 109.  
2. Co. 16. b.  
1. And.  
4. Com. Dig. 393.

(a) 2. Co. 16.

## Talory against Jackson.

## CASE 10.

Trinity Term, 8. Car. 1. Roll 187.

DEBT upon the 2. Edw. 6. c. 13. for carrying away his corn, the tithes not being set out 20. Jac. 1. and 21. Jac. 1. and until 11. Car. 1. The defendant pleaded for the last three years *non debet*, and for the residue, the statute of 21. Jac. 1. c. 16. of Limitations. And hereupon the plaintiff demurred; and the record being read, ALL THE COURT held, that the statute doth not extend to this action.

The statute of Limitations does not extend to  
2. Edw. 6. c. 13.  
1. Stat. 306.  
1. Lev. 191.  
1. Saund. 38.  
5. Com. Dig. 532  
Dunb. 213.  
A demurrer once joined cannot be waived without consent.

Whereupon ROLLE, for the defendant, moved, that the demurrer should be waived, and they would plead *non debet* for all.—But THE COURT said, it could not be without the plaintiff's consent.

Ante, 3. 7.—Eames, 155. 1. Burr. 316. 5. Com. Dig. 136. 532. 4. Bac. Abr. 131.

See 8. & 9. Will. 3. c. 11.

Sir



## CASE 11.

Sir John Fitzherbert *against* Sir Edward Leach.

A writ of error lies in the exchequer chamber upon errors of fact as well as errors of law.

**E**RROR in the exchequer chamber of a judgment given in an ejectment in the king's bench. The plaintiff assigns for error, That whereas FIVE were named defendants, and in the record it is mentioned, that after the verdict against them all, and after the last continuance, TWO of the defendants were dead, as the plaintiff surmised, and the defendants *hoc non didicerunt sed cognoverunt fore verum*, the judgment is entered against the three; that the TWO did not die since the last continuance made upon the roll, but long time before the verdict, and before divers continuances on the roll entered.—Whereupon BANKS, the King's Attorney, moved, that it might be examined in this court.—But THE COURT held, that they might not here make any such examination, being after the judgment entered (a).

An effoin in deed is assignable in the exchequer chamber on 27. Eliz. c. 8.

Cro. Eliz. 731.  
Cro. Jac. 5.

If an error in fact be assigned on the 27. Eliz. c. 8. it may be tried by writ of *nisi prius* in the exchequer chamber.

And then it was moved, Whether an error in deed be assignable in the exchequer-chamber, upon the 27. Eliz. c. 8. ? because, as BERKLEY said, the statute only gives authority to examine errors in law.—But BRAMPSTON, JONES, and MYSELF held, that it is well assignable; for the statute giving the writ of error, gives that authority as well to examine errors in deed as errors in law.

Then it was moved how it should be tried: and HODSDEN, the Secondary, said, that it had been tried by *nisi prius* out of the exchequer-chamber; and there be divers precedents to that purpose.—But JONES said, he doubted thereof, because the statute gives this power to the Justices of the one bench and the other; and that the court of the exchequer-chamber is newly erected. And BERKLEY held, that it was not the intent of the 27. Eliz. c. 8. to give them such authority. But BRAMPSTON, Chief Justice, and MYSELF doubted thereof, because the statute giving authority to reverse or affirm, implies an allowance of the means to do it. Whereupon *adjournatur*.—Mich. 42. & 43. Eliz. Roll 335. *Rew v. Long* (b), error in the exchequer-chamber in fact assigned and tried by *nisi prius*, and found and for that cause reversed: and the like case in Hilary Term, 10. Jac. 1. Roll. 75. error in fact assigned there, and tried by *nisi prius* Consimile in Michaelmas Term, 10. Car. 1. Roll 169. in the case of *Smith v. Marchant* (c).

(a) Jones, 410. Moor, 469. 1. Burr. 365. 1d Raym. 717. Sid. 385. Salk. 8. Carth. 181.  
(b) Cro. Jac. 5.  
(c) See 17. Car. 2. c. 8.

## CASE 12.

Thornton *against* Lyfter.

In an action of assault and battery laid on 1st August, and a justification of son assault on the same day, the plaintiff may give evidence of an assault on the 9th July preceding; for the day is not material.

ante, 229.  
2 Roll. A. 680.

697. Dyer, 23.

**T**RESPASS of assault, battery, and wounding, on the first August, 13. Car. 1. The defendant justifies in his own defence, by reason of an assault made by the plaintiff; and issue joined thereupon. The defendant gives in evidence assault and battery by the plaintiff on the second day of July, 13. Car. 1. before, and that it was in his own defence; and produced divers witnesses to prove that. The plaintiff shews, that the battery which he intended was on the ninth day of July, 13. Car. 1.; and produced also divers witnesses to prove that.

LITTLETON, the King's Solicitor, and others of counsel with the defendant, insisted, that it was no evidence; for the plaintiff ought to have made a special replication, and shewn that special matter.

Co. Lit. 282. b. Brownl. 233. Buil. N. P. 17.

But ALL THE COURT held, it was not requisite : and if another day had been shewn in the replication, it should be a departure ; but it sufficeth to shew it in evidence to be done at another day *sans son assault*, for the day is not material.

THORNTON  
against  
LYSTER.

JONES said, if they had both agreed upon one day, it should have been specially pleaded : but BRAMPSTON held, it was all one ; and as it is now pleaded to be at several days, it is clearly unnecessary.

To assault laid  
9th August, and  
plea of son af-  
fault on 2d  
in pleading.

July, a replication that the assault intended was on 9th July, is a departure. The Solicitor urged, that it should be found specially : but THE COURT said, it was so clear, they would not have it so found. And the jury gave one hundred pounds damages (a).

The Court will  
not advise a spe-  
cial verdict in a  
clear case.

(a) This case is denied in Lloyd v. law. 6. Mod. 120. 2. Ld. Ray. 1015. Jones and Others, Easter Term, 13 Geo. — L. C. B. PARKER'S MSS. 127 d 2. Roll. Ab. 680. pl 3 to begood

### Latham against Atwood.

CASE 13.

Michaelmas Term, 11. Car. 1. Roll .

TROVER AND CONVERSION of two hundred and fifty pounds of hops. Upon not guilty pleaded, the case appeared to be,

Hops growing  
out of ancient  
roots are like  
emblems, and  
shall go to the  
personal repre-  
sentatives of a  
tenant for life,  
and not to him  
in remainder.

A woman, tenant for life, takes to husband the plaintiff 5. Car. 1. the remainder being to the defendant for his life. These hops were growing out of ancient roots, being within the land in question : the wife dies the 19th August 9. Car. 1. the hops then growing and not severed, &c.

The question was, Whether these hops appertained to the husband or to him in remainder ? because she died so small a while before the gathering of them ; and they are such things as grow by manurance and industry of the owner, by the making of hills and setting poles.

10 Edw 4. pl. 1.  
21. Hen. 6. pl. 30.  
Owen, 102.  
Co. Lit. 56. a.  
1 Roll Ab. 728.  
1. Com. Dig.  
598.

THE COURT, upon the motion of GRIMSTON, who was of counsel with the plaintiff, held, that they are like emblems, which shall go to the husband or executor of the tenant for life, and not to him in remainder ; and are not to be compared to apples or nuts, which grow of themselves. Wherefore adjudged for the plaintiff.

### Bayns against Brighton.

CASE 14.

DEBT for forty shillings upon a bill obligatory ; and declares, That the defendant by his bill dated February confessed himself to be indebted to the plaintiff in twenty shillings, *sciendum* at Michaelmas following, *ad quam quidem solutionem faciend.* he did oblige himself in forty shillings ; and for non-payment of the forty shillings the action was brought. The defendant pleaded, that at the time of the obligation making he was within age ; and issue thereupon, and found for the plaintiff.

In debt on bond  
for the penalty  
on non-pay-  
ment of the  
principal sum,  
it must be aver-  
red that it was  
not paid at the  
day

And GERMYN, Serjeant, now moved in arrest of judgment, That the declaration was ill, because it is not therein alledged that the twenty shillings was not paid at the day ; for if otherwise, the forty shillings is not due.

Cro. Eliz. 537.  
4. Com. Dig  
281  
Doug 215.  
2. Term Rep.  
384.

ALL THE COURT was of that opinion ; for it is not an obligation with a condition. Whereupon rule was given, that judgment should be entered for the defendant, unless, &c.

Anonymous.

## CASE 15.

## Anonymous.

To call AN ATTORNEY a base rogue and a cheating knave is actionable. Ante, 229. 417. 460. 510. Post. 551.

1. Roll. Ab. 52. Cro. Jac. 339. 427. 586. Moor, 61. 855. Allen, 13. Hob. 9. Godb. 24. Latch. 21. 1. Brownl. 16. 1. Vent. 127. Hutt. 104. Lev. 70. 1. Mod. 272. 1. Lev. 297. 1. Sid. 327. 3. Willf. 59. Stra. 1138.

**E**RROR of a judgment in the common pleas in an action for words. Whereas the plaintiff being an attorney, and maintaining himself his wife and children by his practice, that the defendant spake these words of him and of his office: "He is a very base rogue, and a cheating knave, and doth maintain himself his wife and children by his cheating." Upon not guilty pleaded, and verdict for the plaintiff, and judgment given, the error assigned was, That an action lay not for these words.—But ALL THE COURT held, that the action was maintainable; for it toucheth him in his profession.—Whereupon judgment was affirmed.

## CASE 16.

## Davenport against Penfell.

Trinity Term, 14. Car. 1. Roll 698.

In assumption against an administrator *durante minore etate*, the defendant may plead that the executor was above the age of seventeen at the time of the promise.

*Q. n.* If an administration *durante minore etate* instantly determines upon the minor's attaining seven years of age.

Ante, 240. Eliz. 602. 60. Hob. 251.

**A**SSUMPSIT against an administrator *durante minore etate* of *J. S.* upon a promise to pay for forbearance of a sum, &c. The defendant pleads, that the said *J. S.* was above the age of seventeen years at the time of the promise; and thereupon it was demurred.

The question was, Whether the administration so committed *durante minore etate* instantly determined by his coming of seventeen years of age; for then the administration ceasing, there cannot after be any consideration to ground a promise?

It was urged, that in our law *minor etas* was one-and-twenty years.

But GRIMSTON, of counsel for the plaintiff, said, that this was to be considered according to the civil law, which appoints seventeen years to be full age in such case, 5. Co. 29.—*Et Curia advisare vult.*

Gouldf. 136. Moor, 462. Lut. 342. 1 Roll. Abr. 526. 910. 5. Co. 29. Cro. Eliz. 602. 5. Mod. 395. 2. Vent. 378. Yelv. 128. 2. Roll. Rep. 186. 404. 409. 466. 2. Sid. 40. Vaugh. 93. 5. Com. Dig. 207.

## CASE 17.

## Appleton against Stoughton.

Hilary Term, 10. Car. 1. Roll 256.

A point-maker is a trade within the penalties of the 5. Eliz. c. 4. A custom to use a trade to which a person has not served as apprentice is good against 5. Eliz. c. 4. Ante, 347. 361. 3. Mod. 313. Salic. 610. 6. Mod. 21. 1. Sid. 162. 5. Co. 126.

**D**EBT upon the 5. Eliz. c. 4. s. 31. and demands twenty-two pounds, because he used within London the trade of a POINT-MAKER for the space of eleven months, not being brought up as an apprentice for seven years.

The defendant pleaded the custom of London, that any who is a freeman of one trade, may use any other trade within the city; and pleaded the 7. Rich. 2. c. which confirms the customs of London, &c.: and upon this plea a demurrer was tendered.

The question was, Whether such a custom may be good against the statute of 5. Eliz. c. 4.?

But because it was a general statute, THE COURT inclined in opinion, that this custom might be good, and not taken away by the said statute, being a special custom in a particular place.

The



The plaintiff then took issue upon the custom, and the defendant joined; and the plaintiff surmised, that there is a custom in London, that if any custom of London be pleaded, and denied, and issue thereupon, it shall be tried by a writ to the mayor and aldermen, to certify whether there be such a custom; and they shall make their certificate by the mouth of the recorder *ore tenus*; and prayed to have a writ to certify. And because the defendant *hoc non didicit*, a writ was awarded accordingly.

Co. Lit. 74. 2 Inst. 126. 2. Roll. Abr. 579. 581. Hob. 86. 2. Com. Dig. 16. 1. Burr. 248. 1. Bl. Com. 77. Douglas, 378.

THE RECORDER certified, that there was no such custom for one who useth a manual trade, that he may exercise any other trade, not being apprentice, or brought up thereto; but that there was such a custom concerning trades of buying and selling, as mercer, grocer, &c.

apprentice; but a *chapman* may. 1. Roll. Rep. 10. 1. Saund. 311. 4. Mod. 145. 1. Ld. Ray. 531. 1034. Stra. 552. 10. Mod. 148. 11. Mod. 63. 12. Mod. 251.

And after this certificate it was moved, that this was a mis-trial; for it being a custom which concerns all the citizens, ought not to be tried by such a certificate, but by jury.

BULSTRODE, who argued *for the defendant*, insisted much upon a case in the common pleas, reported by Lord Hobart (a), that a custom of London, which concerns all the citizens, shall be tried *per* *juris*.

But after long deliberation it was resolved by ALL THE COURT, that the trial was good, especially when the plaintiff hath shewn, that there is such a custom that it shall be so certified, and the defendant hath confessed it; so as this manner of trial, being as it were by his consent, he shall not after such trial except against it. And this custom doth not concern all the persons of London, but only those who use manual trades; as if the custom to devise in mortmain, or of foreign attachments, had been tried by certificate, so here the trial is good. And it was adjudged for the plaintiff. 4. Co. 30. 39. Hen. 6. 4. 9. Co. 31. Brook "London," 27. 21. Edw. 4. 4. 33. Hen. 8. Brook "Trials," 14.

(a) Day v. Savage, Hobart, 86.

### Tomlins against Brett.

CASE 18.

ERROR of a judgment in the common pleas in FORMEDON *in descender*; where the tenant vouched John Style, and the defendant counterpleads, that the said John Style, or any of his ancestors, &c. *nunquam aliquod in tenementis, &c.* omitting the word *habuerunt*. And issue being joined, and *nisi prius* awarded, at the day of the *nisi prius* the defendant made default: and at the day in which he made another default; whereupon a *grand cape* was awarded, and judgment given:

And now error brought, Because there was no issue joined by the defendant.

But THE COURT would not allow thereof, but affirmed the judgment; for after the default, the issue and the pleading is out of the court, and the judgment is only upon the default.

The customs of London shall be tried by the certificate of THE RECORDER *ore tenus* on a writ directed to the mayor and aldermen.

Ante, 361.

1. Burr. 248.

An artificer cannot, by the custom of London, use a different art than that to which he was

Ld. Ray. 531.

A custom of London, that a freeman of one trade may use any other within the city, shall be tried by certificate, and not by jury.

Ante, 248. 361.

Hob. 86.

1. Roll. Ab. 579.

2. Com. Dig.

16.

4. Com. Dig.

199.

3. Bac. Ab. 533.

1. Wils. 2.

A writ of error will not lie after an inquest taken on default.

Jones, 412.

2. Roll. Ab. 430.

Salk. 216. 579.

Strange, 46. 612.

1. Term Rep.

279.

2. Term Rep.

87.

## CASE 19.

## Aungell against Sir William Cooper.

Trinity Term, 10. Car. 1. Roll 1331.

On a *scire facias* to reverse a judgment, and have execution against lands in several counties, if the sheriff return that *A.* was *terre-tenant*, and *A.* denies the fact, and it is found that he is not tenant, it cannot be assigned for error that *A.* was dead before the trial was had.

Cro. Jac. 507.

**E**RROR of a judgment in the common pleas; where in a *scire facias* upon a judgment of nine hundred pounds, and execution thereupon, the defendant there being dead, the plaintiff surmised that he was seised of lands in the counties of *Kent* and *Surry*, and prayed a *scire facias* into the several counties: and the sheriff of *Kent* returned, that *Aungell* was *terre-tenant* of the land in the county of *Kent*; and the sheriff of *Surry* returned, that one *Bell* and his wife were *terre-tenants* of the defendant's lands in *Surry*. Whereupon *Aungell*, being warned, took upon him the tenancy of the lands mentioned in the sheriff's return; and pleaded, that another man in the same county at the time of the said return had other lands whereof *T. D.* was *terre-tenant*. *Sir William Cooper*, the then plaintiff, denied it; and issue thereupon, and found for the plaintiff, and judgment for him against *Aungell* the now plaintiff. But for the lands in *Surry*, *Bell* and his wife pleaded, that they were not tenants and thereupon they were at issue; and found for them before the Justices of assize, and judgment given, *quod eant inde sine die*. And now *Aungell* brings error upon that judgment, and assigns for error That the said *Bell* was dead before the time of the trial: whereupon it was demurred.

And now argued at the bar by *MAYNARD*, for the plaintiff in the writ of error, that forasmuch as the plaintiff is not to have his land charged sole, if there be more land; and by the surmise of the defendant (who was plaintiff in the first suit) there is land in the county of *Surry* chargeable therewith; and by the sheriff's return that *Bell* and his wife were *terre-tenants*, the finding by the jury, after the death of *Bell*, is void; and so the issue not tried, the judgment is erroneous; therefore he conceived, that the plaintiff may well assign it for error, and take advantage thereof.

But *ROLLE*, for the defendant in the writ of error, shewed, that forasmuch as there be two several *scire facias* into several counties they be as several suits, the one not depending upon the other; and the proceedings are several: and although there be death, &c. alleged in the one, yet it is not material as to the other suit; nor there any cause that the other, against whom the verdict is found should assign it for error: and he cited for this point 5. *Edw. 4.* *Brampston*, *Jones*, and *MYSELF* was of that opinion: for although *Bell* be dead, it is not material to *Aungell*, specially as it is found by this verdict that *Bell* was not tenant; so the Court is attained that he was not tenant, although by death the verdict is void. Whereupon rule was given, that judgment should be affirmed.

Sec 8. &amp; 9. Will. 3. c. 18.

Post. 591.  
Ante, 426.

## CASE 20.

## Mounson against Bourn.

If there be judgment against husband and wife executrix, and a *devassaw't* be proved during the coverture, the husband shall be charged on the death of the wife. Post. 564. 603—1. Jones, 417. 1. Roll. Abr. 1. Hen. 312. 1. Law. 671. 1. Sid. 337. 1. Salk. 116. 1. Arth. 30. 3. Mod. 136.

**E**RROR of a judgment in the common pleas in DEBT, by *William Bourn* against *Sir William Mounson* and *Margaret* his wife executrix of *Charles Earl of Nottingham*, for two hundred pounds of debt, and four pounds costs *de bonis testatoris*, &c. *si non*, &c. *tunc de bonis propriis* for the four pounds for costs.

This being in *London*, a *feri facias* was awarded to the sheriffs of *London*; who returned *nulla bona testatoris*, and for the four pounds *nulla bona*.

The plaintiff afterwards, upon a *testatum* that goods were sold and eloined, procured a new *feri facias*, reciting the judgment and the former writ and return thereof, *et quod testatum existit*, that they had goods sufficient, and had eloined and sold them; wherefore the sheriffs of *London* were commanded, that they by inquisition, *vel alio modo quovislibet quo constare poterit*, should enquire if they had sold or eloined the said goods: and if it were so found, *quod scire faciant* to the said Sir William Mounson and Margaret his wife, that they be in court in *Octab. Mich.* to answer thereto.

The sheriff hereupon returned an inquisition, finding the sale and eloiner of the said goods, and that they *scire fecerunt*, &c. And the parties appeared and demurred upon the writ.

THE COURT, after divers adjournments, adjudged the writ good, and that the defendants should answer.

The defendants thereupon imparl: and afterwards judgment was given by *nihil dicit*, that the plaintiff should have execution *de bonis suis propriis*. Upon this a writ of error was brought *tam in redditione iudicii quam in redditione executionis*.

TAYLOR, for the plaintiff, assigned error in the judgment, Because it was *quod recuperet* the damages *de bonis propriis*, *si non habeant bona testatoris*, where they appeared the first day upon the summons; and judgment given the same Term upon a *nihil dicit*, where they ought to have had judgment *de bonis testatoris*: for that purpose he cited 1. Hen. 6. 13. 33. Hen. 6. 23. 34. Hen. 6. 27.—*Sed non allocatur*: because it is not the confession, but the delay which is the cause the plaintiff shall recover damages *de bonis propriis*.

Judgment for damages and costs against husband and wife executrix shall be *si non*, &c. *de bonis propriis*.  
1. Roll. Ab. 928.  
933.  
2. Saund. 107. Wentworth, 268. 2. Bl. Rep. 1276. Cowp. 289. 292.

SECONDLY, Whereas it was objected, that the judgment being *de bonis propriis* against the wife, and in law a *feme covert* hath not any goods, therefore the judgment should be void:—IT WAS RESOLVED, that the judgment was well given; for the husband being charged in right of his wife, the judgment shall be against both, and she may have goods as a term or chattel real before the coverture: so she may have goods after her husband's decease.

If a woman executrix waste the goods *dum sola*, judgment after coverture, on *devastavit* returned, shall be *de bonis propriis*.

1. Roll Abr 931. Cro Jac. 191. 2 Lev. 145. 5. Com Dig. 209.

THIRDLY, That a *devastavit* may well be by a wife by the eloining the goods, as a *feme covert* may do a *tort*, and be punished for it: so this was a *devastavit* by the wife when she was sole.—AND IT WAS HELD, that if a man takes an executrix to wife, and waste the goods, it is a *devastavit* in the wife; for it was her folly to take such a husband, who would make a *devastavit*.—AND JONES said, If there be a recovery very against husband and wife upon a *devastavit*, if the husband survive the wife, he shall be charged; also if the wife survive, she shall be charged: but if the recovery be not against husband and wife in the life of the wife, and she dies, the husband shall not be charged. Where to BRAMPSTON agreed.

If a man marry an executrix and waste the goods of the testator, it is a *devastavit* in the executrix. Post 603.

Dyer, 210. in marg.  
5. Co. 27.  
1. Lurw. 670.  
1. Com Dig. 249.

For the principal matter I delivered my opinion, that this writ is good, and the judgment good, as the case is; for they being returned an executor, the plaintiff may have a special *scire facias* suggesting a *devastavit*.

On *nulla bona* to a *feri facias* on a judgment Post. 527.

2. 210. 5. Co. 32. Cro. Eliz. 859. Jones, 418. Stra. 440.



MOUNSON  
against  
BOURN.

"warned," and appearing and demurring upon the writ, which being adjudged good (as well it may, being a judicial writ, and framed by the discretion of the Court), and the party being warned, and not pleading or traversing the *devastavit*, as he well might, there is great reason judgment should be entered against them; for it was their folly they would not plead: and it is out of the mischief put in *Pat-*

(a) 5. Co. 32. *tifer's Case* (a).

JONES and BRAMPSTON would not deliver any opinion on the first point, but would advise. BERKLEY was absent and in chancery (b).

(b) It was moved again in Hilary

Term, and all the Judges gave their opinions *seriatim* in favour of the plaintiff, that the writ was good, and that the judgment and execution should be affirmed. Post. 528.

#### CASE 21.

#### Morrice and Others against Prince.

In an assise for arrears of a rent-charge devised to the plaintiff, if the jury find an arrear of thirty years, without finding when the devisor died, the verdict is bad; for otherwise the certainty of the arrear cannot be known.

S.C. Jones, 413.  
S. C. 2. Roll.  
Abr. 424. 693.  
March. 97.  
Cro. Jac. 653.  
Noy, 125.  
12. Mod. 561.

**E**RROR by *Thomas Morrice* and *Elizabeth* his wife against *Thomas Middleton*, *James Palmer*, *John Lewis*, *Evans Potham*, *J. S.* and *T. D.* of a judgment given against them in an assise, in the county of *Montgomery*, to their damage, &c.

Upon this the record was certified, that the assise was brought *sin* *May*, 10. *Car. 1.* against the said six defendants, and *Charles Vaughan* and *Margaret* his wife, *Sir Peter Mutton*, and six others (in all fifteen persons), that the assise was *de libero tenemento suo* in *Brentdaigne*, and in five other villages within the said county. The said fifteen defendants being returned attached, the plaintiff makes his plaint to be disseised of his freehold, *viz.* of twenty pounds rent issuing out of forty messuages, one thousand acres of land, fifty acres of meadow, &c. in the said villages, within thirty years, &c. And for title he saith, that one *Edward Prince*, *Esq.* was seised in fee of the tenements aforesaid, in the villages, &c. and held them in soccage; and by his will in writing, 20th *December*, anno 1. *Jac. 1.* devised to the plaintiff a rent of twenty pounds *per annum*, issuing out of the said tenements, for his life. And afterward the said *Edward* died seised, and the said tenements descended to the said *Elizabeth* (who afterwards was married to the said *Thomas Morrice*) and to the said *Margaret* (who was after married to the said *Charles Vaughan*): and that the plaintiff was seised of the said rent by the hands of the said *Thomas Morrice*, being seised of the freehold of the said tenements in right of the said *Elizabeth* in *formâ prædictâ*, until by the said *John Morrice* and *Elizabeth* and the other thirteen defendants he was disseised; and thereupon brought this assise. The said *Charles Vaughan* and *Margaret* and nine others of the defendants made default; wherefore the assise was awarded against them by default. Four others of the defendants, *viz.* *Thomas Morrice* and *Elizabeth* his wife, *Thomas Middleton* and *James Palmer*, pleaded, that they were tenants of an acre, parcel of the tenements put in view, and that *Roger Palmer* and *William Hawks* were tenants of the freehold of a messuage and four acres of land put in view, &c. who be not named in the writ for which they demand judgment of the writ. *Et si, &c.* The jury find, that *Roger Palmer* and *William Hawks* were not tenants, &c. and that the plaintiff was seised by the hands of the said *Thomas Morrice* *prout*: and that the plaintiff demanded of the said *Thomas Morrice* and his wife, *Thomas Middleton*, *James Palmer*, *John Lewis*, and

*Evans Potbam*, the said rent; and that they denied to pay it; and so they disseised him of the said rent, and found arrearages for thirty years and an half: and for the other nine they find, that they did not disseise. And hereupon judgment was for the plaintiff against six; and for the nine, *quod aleront sans-jour*.

MORRICE and  
OTHERS  
against  
PRINCE.

Upon this error was brought, and assigned principally, Because he demanded rent by a devise; whereof arrearages are found for thirty years: and it doth not appear when the devisor died, nor any time or feast appointed for the payment; and therefore the verdict is clearly ill, because the time of the devisor's death not appearing, the certainty of the arrearages cannot be known.

THE SECOND QUESTION was, If the jury finding a *seisin* by the hands of one of the husbands of the said heirs, whereas the land descended to two daughters, whether this were a sufficient finding of the *seisin*?—And IT WAS RESOLVED that it was; as *seisin* given by one jointenant, &c.

A *seisin* by one of two coparceners is good for both.

6. Co. 57 b.

Booth, 214.

Salk. 83. Cowp 219.

THE THIRD QUESTION was, If the jury finding the demand of the rent from six of the defendants, and their denial of payment; and not finding that it was demanded upon the land (but that they so disseised the plaintiff), whether that were sufficient?—For it was held by all the Justices, that the demanding of it of their persons off the land, and their denial, is not sufficient; for it ought to be upon the land: but this being upon a verdict in an assise, I held, that the Court shall intend it was a demand upon the land, as 33. *Edw. 3. title Verdict*, 40. and *Co. Lib. 9.*—But BRAMPSTON, JONES, and BARKLEY held, that it shall not be so intended.

A demand of rent, and a refusal of payment, is not a disseisin of the rent, unless it be made upon the land.

Ante, 508.

Co. Lit. 153.

202. 3 315.

The judgment was reversed, because it was not found when the devisor died.

Sec 4. Geo. 2. c. 28.

### Lee against Boothby.

CASE 22.

UPON evidence to a jury at the bar for a copyhold, parcel of the manor of *Earls-Chingsford*, in the county of *Essex*, the question was, If a copyholder in fee surrender to the lord of the manor his copyhold estate, and the lord make a lease for years of the manor and of the said copyhold, by the name of his tenement called *the manor*, whether it is a determination of the copyhold?—And it was held by ALL THE JUSTICES, *absente* BRAMPSTON, that it was not, because when he lets the manor, it is included as a parcel of the manor: and if he, though he had been but *dominus pro tempore*, or for half a year (though by parol) had made a lease for years of the copyhold by himself, that had destroyed the copyhold; for it was then, during that time, severed from the manor, and so could never afterward be demised again by copy: but the manor being demised, includes the copyhold as parcel of the manor, and the naming of the copyhold is superfluous; and it remains always as parcel of the manor, and demisable by copy as it was before (a).

If the lord of a manor lease the manor and a copyhold by name, it will not extinguish the copyhold; but if he lease a copyhold by itself, it is gone as a copyhold forever.

Jones, 449.

2. Co. 17. a.

4. Co. 31. b.

1266.

1. Keb. 720.

Hob. 181. 190.

215.

Cro Jac. 253.

Bunb. 138.

(a) See the case of *Reeve v. Jodrel*, 2. Term Rep. B. R. 415.

## CASE 23.

## Claxton against Libourn.

If issue of battle bejoined, champions allowed, and security given to perform it, evidence that the champions were hired ought not to be received.

3. Inst. 158.  
2. Rush 790.  
1. Com. Dig. 587.

**WRIT OF RIGHT** in *Durham*. The tenant waged battail, which was accepted; and at the day to be performed, **BERRY, Justice**, there examined the champions of both parties, Whether they were not hired for money? And they confessed they were; which confession he caused to be recorded, and gave further day to be advised. And by the king's direction all the Justices were required to deliver their opinions, Whether this were cause to de-arraign the battail by these champions?—And by **BRAMPSTON, Chief Justice**, **DAMPORT, Chief Baron**, **DENHAM, HUTTON, JONES, MYSELF**, and other Justices, it was subscribed, That this exception, coming after the battail gaged, and champions allowed, and sureties given to perform it, ought not to be received. *Bracton*, 161.

## CASE 24.

## Goodwin against Anne West.

Hilary Term, 13. Car. 1. Roll 1321.

Debt upon 5.  
*Et c. 9. f. II.*  
for not appearing to a *subpœna*.  
Post. 540.

Jones, 430.  
Cro. Eliz. 130.  
Ld. Raym. 1527.  
Str. 50. 1054.  
1150.  
Black. Rep. 36.  
B. R. H. 313.  
2. Bac. Ab. 295.  
Douglass. 558.

3. Term Rep. 511.

In reciting a statute, a variance of "in aliquâ curiâ," instead of "in aliquibus curiis," is not material.

2. Balst. 47. 51. 1. Com. Dig. 232. 2. Hawk. P. C. 350. Cowp. 229. 474. 1. Term Rep. 237.

In an action for not appearing to a *subpœna*, it need not be averred that the *summing* was sufficient for the charges. Douglass. 558.

**DEBT** for ten pounds on the 5. *Eliz. c. 9.* Whereas the plaintiff having a suit in the common pleas against one *Turburlock*, in an action for words, wherein he shews, That he was a suitor to the said *Anne West*, the now defendant, to have married her (she being a woman of a good estate); and that the then defendant, to defame him and deprive him of his hopes of the said marriage, said of the plaintiff, "He hath had a bastard by one *A. S.*" whereby he was greatly disparaged, and lost the said marriage. To which the then defendant pleaded not guilty: and thereupon a *nisi prius* being awarded to be tried at *Gloucester* the one-and-twentieth of *July* following, he sued a writ of *subpœna* out of the common pleas, directed to the said *Anne West*, to testify in the said cause at the said assizes, before the justices of *nisi prius*, upon the said one-and-twentieth of *July*; and that the seventeenth day of *July decimo quarto CAROLI* he shewed it to the said *Anne West*, the now defendant, and left a note with her of the day and place of appearance, and delivered to her twelvecence towards her expences and charges, and promised to her, if she would come at the said day and place to testify, &c. he would give her so much more *pro expensis et oneribus suis* as she would reasonably require; which sum of twelvecence she accepted; and that she did not come *ad testificandum*, although she was required, whereby the action passed against him: whereupon he demanded, according to the statute, ten pounds, and his further damages by the Court to be taxed. Upon *non debet* pleaded, it was found for the plaintiff.

**CHARLES JONES** now moved in arrest of judgment, **FIRST**, That the statute is mis-recited; for the statute is, "If suit be commenced *in aliquibus curiis*," and he recites it "*in aliquâ curiâ*," so it varies.—*Sed non allocatur*; for it is all one in intendment.

**BRAMPSTON**



BRAMPSTON, *Chief Justice*, was of that opinion, because she is not compellable to come upon promise without charges delivered.

GOODWIN  
against  
WEST.

JONES doubted thereof.

But BERKLEY and MYSELF held it to be good when she accepted the twelvepence, and she did not say she would have more for her expences.

THIRDLY, that "*oneribus*" is no word for charges.—*Sed non* (a) This case was moved again in *Easter Term*, and *Post*. 540.  
*lucatur*; for being joined with "*expences*," it shews that it was intended *promissis* (a).

adjudged, on a new point, for the defendant.

Hilary

## Hilary Term,

14. Car. 1. In the King's Bench.

*Sir John Brampton, Knt. Chief Justice.*

*Sir William Jones, Knt.*

*Sir George Croke, Knt.*

*Sir Robert Berkley, Knt.*

*Sir John Banks, Knt. Attorney General.*

*Sir Edward Littleton, Knt. Solicitor General.*

} *Justices.*

### CASE I.

### Lord Say's Case.

Resolutions in  
the case of  
SHIP-MONEY.

Post. 601.

2. Rushw. 355.  
480.

3. Rushw. App.  
159.

2. Roll. Ab. 174.

**A**CTION of TROVER and CONVERSION of three oxen taken for three pounds five shillings, assessed by the sheriff of Lincoln upon the plaintiff towards finding of a ship.

Upon demurrer at the bar, HOLBOURN being ready to argue, BANKS, *Attorney General*, moved, that he might not be permitted to argue any of the matters contrary to the judgment in the exchequer-chamber betwixt the king and *Mr. Hampden*, wherein he said four points were adjudged:

FIRST, That the writ was legal by the king's prerogative, or at leastwise by his regal power.

SECONDLY, That the sheriff, by himself without any jury, may make the assessment.

THIRDLY, That the inland counties ought to do it at their proper charges, and to find men and victuals out of their counties for the time in the writ mentioned.

FOURTHLY, That the sum assessed was a duty, and may be levied.

HOLBOURN offered to argue, that any one, who was not party to the former judgment given in the exchequer-chamber, may be permitted to argue against it.

But BRAMPSTON, JONES, and BERKLEY (the writ being allowed to be legal), said, that such a judgment ought to stand until it were reversed in parliament, and none ought to be suffered to dispute against it.—NOTE, That the resolution in *Mr. Hampden's Case* (a) was adjudged to be against law, and repealed by the statute of 17. Car. 1. c. 14.

(a) Post. 601.

### CASE 2.

### Edwards against Rogers.

*Trinity Term, 11. Car. 1. Roll*

If the uncle of an idiot who is seised of a reversion in fee, levy a fine and die in the lifetime of his nephew, the grandson of the cognizor, on the

**T**RESPASS. Upon not guilty, and a special verdict, the case was, Tenant for life, reversion to *William Rogers*, an idiot, in fee. *Andrew Rogers*, his uncle, levies a fine come ceo, &c. with proclamation to *Robert Crompton*; and had issue *John*, who had issue *William* the defendant, and died. *William* the idiot died without issue. *William* the defendant enters as heir to him, viz. son and heir of *John*, son and heir of the said *Andrew*.

on the death of the idiot without issue, is not bound by the fine. Post. 543.—Jones, 456. 460 March. 94. 3. Com. Dig. 353. S. C. Post. 545. 2. Inst. 523. 3. Co. 89. Hob. 333. 1. Salk. 341. Cruise, 159.

The

The question was, Whether he may claim against this fine of his grandfather (not claiming by the grandfather, but deriving only his pedigree from him)?

EDWARDS  
against  
ROGERS.

And it was argued by ROLLE, for the plaintiff, that forasmuch as William Rogers is heir to Andrew his grandfather, uncle to the said William the ideot, he is estopped to claim against this fine, or to say *quod partes ad finem nihil habuerunt*. And for proof thereof he relied upon the 27. Edw. 1. c. . of Fines, and THE YEAR-BOOKS 8. Hen. 4. pl. 9. 40. Edw. 3. pl. 9. 2. Edw. 3. pl. 10. 17. Edw. 3. pl. 54. 2. Edw. 3. pl. 6. 19. Hen. 8. pl. 7. 3. Co. 89. 18. Edw. 3. pl. 41. 11. Hen. 7. pl. 12. *Scovell v. Braffstock* (a), 3. Co. 50. *Sir George Brown's Case* (b), and *Saule v. Clerke* (c).

But it was argued by FARRER, for the defendant, that this fine shall not bar, because he claims not any interest by or from Andrew, nor as heir to him, but only makes mention of him in the pedigree. And he relied upon *Hobbes's Case* in the exchequer, cited in *Co. Lit.* 8. a. 2. Edw. 3. pl. 6. 10. 17. Edw. 3. pl. 54. 38. Edw. 3. pl. 11. 8. Co. 53. *Synms's Case* (d), 36. Edw. 3. title "View," 30. in "sur cui in vita," 33. Hen. 6. pl. 18. 15. Edw. 4. title "Entry" "Congeable," 51. 39. Hen. 6. de "Fessment del Fits" en vie son pere; and that here he is in quasi of another title, and puisny to the fine (e).

Ante, 156.

Lat. 64. 72.

Dyer, 3. a. 277.

(e) *Vide* the opinion of THE COURT upon this case. Post. 542.

(a) Ante, 453.

(b) 3. Co. 50.

(c) Ante, 156.

(d) Cro. Eliz. 33.

### Whyte against Hanbye.

CASE 3.

Easter Term, 14. Car. 1. Roll 465.

ERROR of a judgment in the common pleas, in an action of *trover* and *conversion* of goods. The writ supposeth, that such a day, at *Alston* in the county of *Suffolk*, he was possessed, &c. and lost them; and the defendant found them, and converted them to his own use; and in the count he sheweth the *trover* and *conversion* to be at *Alston* aforesaid.

The error was assigned, Because the place of *conversion* was not shewn in the writ. And now MAYNARD, for the plaintiff in the writ of error, argued, that the place of *conversion* ought to be shewn in the writ; for it being an action upon the case, the count otherwise is not good; and for that purpose vouched 3. Hen. 6. 48. Edw. 3. pl. 6.

BERKLEY and MYSELF, being only in court, held, that the writ was good enough; for the possession supposed to be at *Alston*, and the loss, *trover*, and *conversion*, being all conjoined with a copulative, shall be intended all in one place, viz. at *Alston*, especially the count mentioning the *conversion* to be at *Alston*, and the issue there tried, and verdict given. But BERKLEY said, if the writ be vitious for this cause, it is not aided by the verdict; but we both agreed, that as this case is the writ is good. Whereupon rule was given, that judgment should be affirmed, unless, &c.

By 16. and 17. Car. 2. c. 8. after verdict judgment shall not be stayed or reversed for the mistake of day, month, or year, in any declaration, &c. where the

right day, month, or year, in the same or any preceding writ, plaint, roll, or record, is once truly alledged.

Afcough's



## CASE 4.

## Ascough's Case.

*In the Court of Wards.*

A devise of a manor held by knight's service, to be sold by executors, and part of the produce to be applied to a charitable use, did not bar the king of his interests in the estate.

S. C. Jones, 428.

(a) But now by 12 Car. 2. c. 24. &c. taken away.

A devise of an estate to a charitable use was void against the heir of the deviser as to a third part.

**T**HIS case was referred by the king's command to the Justices of the king's bench, to certify their opinion, which was thus: One *Ascough*, seised in fee of the manor of *D.* holden by knight's service *in capite*, devised the said manor to be sold by his executors, part of the money to be paid to his wife, and part in divers other legacies, the residue to be bestowed in charitable uses, *viz.* for the marrying of poor maidens and relief of prisoners, &c.

**THE FIRST QUESTION** was, Whether this were a good devise to bind the king, and to bar him of his *primer seisin* by the statute of 43. *Eliz.* c. 4. of Charitable Uses?—And **ALL THE JUSTICES** held clearly, this shall not bar the king for his interest of wardship, livery, or *primer seisin*, because general words, where the king is not named, shall never bind or bar him (a).

the tenure by knight's service is abolished, and all wardships, liveries, primer seisin, &c. taken away.

**THE SECOND QUESTION** was, Whether such a devise by the said statute be good against him for the whole, and shall bar the heir to claim a third part?—And **THEY ALL RESOLVED**, admitting it to be a conveyance within the statute, yet it is void against the heir for the third part; for by the statute, of 32. *Hen.* 8. c. 1. and 34. *Hen.* 8. c. 5. he hath no power to dispose but of two parts, so for the third part it is clearly void (b).

(b) But by the 12. Car. 2. c. 24. an alteration is made in the nature of tenures, which makes the power given by these statutes amount to the whole of a person's landed property.

*Qu.* If a devise of lands to be sold, and the produce to be applied to the marrying of poor maidens, &c. is within the 43. *Eliz.* c. 4. Prec. Ch. 391.

**THE THIRD QUESTION** was, Whether this were a conveyance within the statute of 43. *Eli?* c. 4.? because here is not any disposition of *the land* to charitable uses, but an appointment that the land shall be sold, and *the money* divided, part to his wife (who is clearly out of the statute), another part to satisfy divers legacies, and the residue, which in truth was the greatest part, to the said charitable uses.—But as to this they all resolved not.

2. Vern. 597. Salk 163. Duke's Ch. Uses, 109.

## CASE 5.

## Gybbs against Wybourn.

Tithes are payable for young trees planted in a nursery-ground for sale.

S. C. 1. Roll.

Ab. 637.

S. C. Jones, 416.

Hardres, 380

3. Com. Dig. 95.

**P**ROHIBITION, For that the defendant libelled in the spiritual court for tithes of young trees planted in a nursery upon purpose to be rooted up and sold to be planted in other parishes. Upon demurrer the question was, Whether tithes shall be paid for them?

**ROLLE**, for the plaintiff, argued, that they were of the nature of the land, and tithes shall not be paid of them, no more than of mines of coal or stone digged, or for trees or wood spent in hedging, or fuel in the house, wherein husbandry is maintained.

**MAYNARD** argued, that forasmuch as he made a profit by such young trees, it is reason tithes should be paid for them when he digs them up and sells them in another parish, as well as of corn, or carrot-roots, or such things.

And **ALL THE COURT** was of this opinion; whereupon a consultation was awarded.

Lord

Lord Mounson and his Wife *against* Bourn.

CASE 6.

*Vide ante, Page 518.*

THIS case was now argued openly at the bench by JONES and BERKLEY, for the defendants in the writ of error, that the judgment ought to be affirmed.

BERKLEY argued, FIRST, that there being no error assigned in the principal judgment, it is therefore to be affirmed. The assignment was "*in redditione executionis*," because the *scire facias* in the said writ was, "*si constare poterit per inquisitionem vel alio modo*," that they had waited the goods, "*quod scire faciant eis ad respondendum*," to the said *devastavit*, and shew cause wherefore execution should not be awarded of their proper goods, which being a judicial writ may be well framed as the Court shall appoint: for as THE REGISTER is the rule for original writs whereby they are framed, which is confirmed by act of parliament, and there ought not to be any variance from them but by authority of parliament, as the statute of *Westminster*, c. 2. saith; so for judicial writs, they may be framed according to the discretion and direction of the Court: and for this cause these writs have been usually granted in the common pleas, and frequently used after 9. *Hen. 6.* as appears by the said Book, fol. 57. and therefore we ought to adjudge it to be the law in the same court, and not to adjudge the contrary: as in *Wiscot's Case* (a) an ejectment was brought on a lease by husband and wife: and he doth not shew that it was by deed, for without deed it is clear it is not a lease of the wife; yet because it is usual in the said court to omit the mentioning of the deed, it shall be intended to be by deed; and the precedents of the court warrant such declarations, therefore it was adjudged to be good (b). So in *Slade's Case* (c), it was adjudged, by reason of the multitude of precedents in the king's bench, that an action on the case may be maintainable where he might have had an action of debt, and that the common course had been to have debt until then, and some had been reversed for this cause; yet being argued in the exchequer-chamber, and there made apparent by the precedents in the king's bench, that such actions were allowed in the king's bench, it was adjudged, that it ought to be taken for law (d). And so it had been used since in the common pleas; yet no precedents were shewn before the time of *Henry* the sixth. So here the precedents and judgments in the common pleas warranting this course, it is to be taken now as the law of the court, and to be allowed. And to answer to *Petifer's Case* (e), he said, there was great difference betwixt the cases; for there the inconvenience was, because the judgment was by default upon two *nihilis* returned; but here they are returned "*warned*," and appeared, and they might have traversed the inquisition, and taken issue thereupon, viz. that they had not made any devastation. And for the case cited 12. *Edw. 3. tit. "Execut."* 9. it is a harder case than this; for there, upon a *fieri facias*, was returned *nulla bona*; and upon a *testatum*, that they had goods and wasted them, the sheriff was commanded that he should inquire thereof, and if he found they had wasted, he should make execution *de bonis propriis*; so without any other warning he was to

If *nulla bona* be returned to a *fieri facias de bonis testatoris*, and a *devastavit* be suggested on the roll, a writ of inquiry shall be directed to the sheriff, and if by inquisition the *devastavit* be found and returned, there shall be a *scire facias quare executionem non de bonis propriis*, to which, upon *scire feci* returned, the executor may appear and traverse the inquisition; but if he make default, or if he be found against him, or two *nihilis* be returned instead of *scire feci*, the judgment shall be *de bonis propriis*; but although he neglect to appear and traverse the *devastavit* returned, he may be relieved on *audita querela*.  
Post. 564 603.  
S. C. Jones, 417.  
1. Roll. Ab. 933.  
Noy, 11.  
Dyer, 210.  
5 Co. 32.  
Cro. Eliz. 859.  
1. Sid. 337 398.  
1. Salk. 30.  
1. Saund. 217.  
Carter, 2.  
2 Lev. 161. 209.  
1. Vent. 315.  
321.  
Stra. 440.  
1. Com. Dig. 256.

(a) 2. Co. 61. b.

(b) 4. Co. 93. a.

(c) Cro. Eliz. 438. 481. 656. 708.

Palmer. 268. Hutt. 55. 102. Cro. Jac. 163.

163. Plowd. 431. Winch. 34. 1. L. an.

152. 204. 4. Leon. 50. Sav. 110. Dyer, 91.

(d) 5. Co. 28. 1. Salk. 9. 1. Mod.

163. 10. Co. 77.

(e) 5. Co. 32.

take

L.D. MOUNSON  
and his WIFE  
against  
BOURN.

Cro. Jac. 3. 59.  
Dyer, 168. a.

take their proper goods in execution: yet he conceived, that in such case, if the sheriff had done so, he was not chargeable in an action upon the case, because he did it by the Court's command; but in this case the Court was more favourable, to have an inquisition before, and not immediately to make execution, but to warn the parties to shew cause wherefore he should not have execution. And when they appeared, and would not answer, but suffered it to pass by *nihil dicit*, it is *quasi* a confession thereof, and therefore good reason they should be charged *de bonis propriis*; wherefore he concluded, that there is no error either in the judgment or execution, and that they should be affirmed.

JONES argued to the same purpose, that the custom and precedents in all courts are the law in the same court, and constant judicial proceedings are to be accounted law; and therefore in the common pleas it is the usual course to have but one *scire facias* to have execution, which being returned *nihil*, the party is to have execution. But in the king's bench the usual course is to have two *scire facias*; and if execution be taken upon one *scire facias* awarded and *nihil* returned, it is error, and therefore may be reversed, because it is contrary to the course of the court. And this case differs from the reasons and mischief in *Petifer's Case*, because the return here is, that they were warned and made default, and would not plead; whereupon he concluded also, that the judgment and execution should be affirmed.

BRAMPSTON, *Chief Justice*, argued the same way, that as this case is, it should be affirmed; for it is no inconvenience here to the parties, or to the sheriff, when the sheriff takes an inquisition which finds a *devastavit*, and the party is warned and appears, and demurs thereupon, so that he takes notice of the writ; and the common course and precedents of the court are the law of the court (a), and one court ought to take notice of the customs and courses of other courts, as it is held 6. *Edw. 4. pl. 1. 11. Edw. 4. pl. 1. and 2. Co. 16. Lane's Case*, which is a stronger case than this; for there it is, that a lease under the exchequer seal is as well allowable and pleadable in this court as if it had been under the great seal (b). And although regularly a freehold cannot pass but under the great seal, yet in regard of the usual course of the exchequer, and multitude of precedents there (of which course the common pleas ought to take notice), and for the inconvenience whereby many subjects should be otherwise prejudiced, it was adjudged good and allowable there; *à multo fortiori* here, because this course of awarding those writs hath been continued in this court ever since 9. *Hen. 6.* and therefore there is great reason they should be now allowed. And for the mischief alledged, that the party should be concluded by this inquest of office, it was said, there was not any mischief; for it was agreed by all of us, that he may contradict it upon his appearance, and traverse it: and when he is warned and will not answer, it is *quasi* a confession that it is true, and it was his fault he would not traverse it.—And where it was said, that it may be taken by default upon two *nibils* returned; and so he should be prejudiced, I thereto answered, there was not any mischief; for if it should be false, he might have an *audita querela*, and so help himself, as *Fitz. Nat. Brev. 104. 1.*—And so we concluded, that the judgment and execution should be affirmed, and gave a rule to the prothonotaries, that such course of writs should be there used as consonant to law and justice.

(a) *Bridgman*,  
21.  
4. Co. 93. b.  
9. Co. 30. b.  
Hard. 340.  
1. Saund. 73.  
133.  
(b) Ante, 513.  
1. Leon. 179.  
Cro. Jac. 109.  
1. Roll. 524.  
2. Roll. 182.  
R. 180.

See the Case of  
*Bullew v. Scott*,  
5. 2. 440.



Smith *against* Risley and Others.

CASE 7.

Trinity Term, 14. Car. 1. Roll .

**EJECTMENT.** Upon a special verdict the case was, *Paul Risley* was seised in fee of the lands in question, and by indenture betwixt him and *Sir Thomas Denton*, *Sir Alexander Denton*, *Thomas Risley* his brother, and *William Withers*, "COVENANTED and agreed with them, That for the favour and affection which he did bear to his wife and children in that indenture mentioned, and for the better maintenance, livelihood, and preferment of them, and to the intent to settle the lands, tenements, and hereditaments hereafter mentioned in the name and blood of the said *Paul Risley*; he did thereby COVENANT for him, his heirs and assigns, to and with the said four parties and their heirs, that he the said *Paul Risley* and his heirs shall at all times from henceforth stand and be seised of the said tenements (in the declaration mentioned) to the use of the said *Paul Risley* for term of his life, without impeachment of waste; and after his decease, to the use of *Dorothy* his wife for term of her life; and after her decease, to the use of the said covenantees and their heirs. NEVERTHELESS, upon special trust and confidence, that they shall make leases and estates thereof, or of any part thereof, as the said *Paul Risley* shall appoint by any his deed, &c. And in case that he make not any such appointment, then the said covenantees and their heirs shall levy out of the rents, issues, and profits thereof, for his younger children hereafter named, viz. *Crescens*, *Peter*, and *Paul*, his younger sons, and for *Mary*, *Dorothy*, and *Elizabeth*, his three daughters, two hundred pounds a-piece: the daughters portions to be paid at their respective ages of twenty years, and the sons portions at their respective ages of twenty-four years; and that the said covenantees and their heirs shall pay, allow, and give out of the rents, issues, and profits to every of the three sons and three daughters such reasonable maintenance as they shall appoint; and after the decease of the said *Paul Risley* and *Dorothy* his wife, and the said portions levied, then to the use of *Thomas Risley*, second son of the said *Paul Risley* (the now defendant), and the heirs of his body; and for want of such issue, then to the said *Crescens* and the heirs of his body (and so to his other sons, and then to the use of his daughters and the heirs of their bodies); and for want of such issue, to the use of the right heirs of the said daughters for ever." The jury find, that on the fifth day of *September*, in the second year of *Charles* the first, *Paul Risley* died, and that *Dorothy* his wife survived him, and entered, and was seised, *prout lex*, &c.: and that afterwards, viz. 12th *September*, 2. Car. 1. *Sir Thomas Denton* and the other three covenantees by indenture, inrolled within six months in the chancery, bargained and sold to the said *Thomas Risley* the brother the said tenements, HABENDUM to him and the heirs of his body, to the intent he should perform the trusts in the said first indenture mentioned, the remainder over, as is limited in the first indenture. They find, that *Mary*, one of the daughters, attained to the

If *A.* by indenture, made between him of the one part, and *B.* his brother and others, who were strangers, in consideration of love and affection to settle his land in his name and blood, covenant with them to stand seised to the use of himself for life, and after to his wife for life, and after to the covenantees and their heirs in trust, to raise portions, &c. &c. the uses are well raised by this deed to *B.* his brother, but not to the other covenantees.

S. C. Jones, 418.  
S. C. 2. Roll.  
Abr. 783.  
Plow. 305. 307.  
Yelv. 51.  
7. Co. 40.  
Sid. 83.  
Cro. Jac. 180.  
Cowp. 9. 60a.

SMITH  
against  
RISLEY,  
and OTHERS.

the age of twenty years in the life of the said *Paul Risley*; and that *Dorothy*, another of the daughters, attained to the age of twenty years after the death of the said *Paul Risley*, in the life of her mother; and that none of their portions were paid; and that *William Risley* (the lessor of the plaintiff), son and heir of the said *Paul Risley*, entered and made this lease, and the defendants ousted him. *Et si super totam materiam, &c.* the defendants be guilty, they pray the discretion, &c.

And it was argued divers times at the bar by *WARD* and *HOLBOURN*, for the plaintiff, and by *PORTER* and *GRIMSTON*, for the defendants. And it was said for the plaintiff, that this deed raised no uses, because all the four covenantees, except *Thomas Risley* the brother, are strangers in blood to the covenantor: and that *Thomas Risley* the brother, although he were named brother, was named for distinction only betwixt him and *Thomas Risley* the son, and not for the consideration of blood to raise a use to him; and the intention was to settle an use in them four, for performance of the trusts mentioned in the deed, and for settling the uses in them all, or else in none of them: and none of the considerations in the deed extend to *Thomas* the brother, nor is intended for his benefit; and so none of them can raise a use in him. For the first consideration is, for the preferment of his wife; the second, for the preferment of his children; the third, to raise portions for the use and benefit of his children; and there is not any benefit or profit mentioned to the brother or his children: and if a use should be raised out of the residue, it is upon a contingency, viz. after payment of the portion; and it now appears that they are not paid, nor can be paid, because the one daughter came to her age of twenty years before the death of her father, the other daughter before the death of her mother.

But ALL THE COURT resolved, that the uses are well raised, and vested in *Thomas* his brother (but not in any other of the three covenantees), because he is of the blood: and one of the considerations is, for consideration to settle it in his blood, which is by the settling in the brother; and although it be not mentioned that it is in consideration that he is his brother, yet being his brother it sufficeth: and it is likewise sufficient, because the brother is to take estate to raise portions to his nephews and nieces, and also to settle estates upon them, according to his appointment: and here is not any contingent use, but only a trust and confidence in the covenantee to execute the estate to his children; but no estate is in the children by any estate limited unto them: then when all the other covenantees join in a bargain and sale to *Thomas* the younger son, he hath a good estate. Whereupon by THE WHOLE COURT it was adjudged for the defendant.

Pl. Com. 307. b.

Co. lib. 7. 40. b.  
Moor, 504.

## Cook against Cook.

CASE 8.

Trinity Term, 14. Car. 1. Roll 1446.

**E**RROR of a judgment in waste. The error assigned was, Because the plaintiff declares, that the defendant *fecit vastum* in a close *in succidendo* three oaks, ashes, and six black-thorn trees growing, &c. The jury found the waste *in succidendo* three oaks, three ashes, and six black-thorn trees, *existentes arbores maeremii*; and found damages jointly for them all.

MALLET moved, that it was error, for black-thorn trees cannot be timber, nor is there any waste lies for them, unless they be growing in hedges, which ought to be specially shewn; therefore the giving of entire damages was erroneous: and it is apparent, that black-thorn trees are not accounted timber, where there are other timber-trees growing in the same close, as 46. *Edw. 3. 9. Hen. 6. pl. 10. 65. & 67.*

But THE COURT, *absente* BERKLEY, agreed, that it is no error: for black-thorn in some countries may be accounted timber; and being averred in the declaration to be timber, and the issue found by the verdict, it is not to be doubted but that it is timber. Wherefore the judgment was affirmed.

Waste may be committed in cutting down black-thorn, the jury finding it to be timber.

Co. Lit. 53.  
Dyer, 65.  
Moor, 812.  
2. Roll. Abr. 817. 819.  
Cro. Jac. 126.  
1. Term Rep. 55.

## Powel against Sheen.

CASE 9.

**P**ROHIBITION was prayed to the council of the marches of Wales, For that upon a bill there for a supposed riot and battery, to the plaintiff's damage of a thousand pounds, they proceeded and gave sentence against the defendant, and awarded one hundred marks damages to the plaintiff; where by their instructions they ought not to hold plea of damages or debt above fifty pounds.

EVERS the King's Attorney for the marches of Wales, answered, that by their new instructions they may hold any plea of riots or misdemeanors, as the star-chamber may.

But it was thereto replied, That although the star-chamber of late time hath used to decree damages to the party, and the legality thereof hath not been questioned, being a supreme court, it doth not therefore follow that other courts may assume unto themselves such a jurisdiction: and although EVERS said, that court is ordained and established by the act of 34. *Hen. 8. c. 26.* it was answered, that the said act doth not authorize that court to do more than formerly had been used; and whether it were before those times so used cannot be shewn.—Whereupon IT WAS ADJUDGED, that a prohibition should be granted.

The courts in Wales cannot hold plea of damages or debt above fifty pounds.  
Poib. 558. 595.

## Pigot against Mary Pigot and Elizabeth Lewen.

CASE 10.

Trinity Term, 14. Car. 1. Roll .

**A**PPEAL of the death of his father, whose heir he is, against the defendants, Because that they, *videlicet*, the said Mary Pigot PRODITORIE, and Elizabeth Lewen FELONICE, conspired the death of Roger Pigot the plaintiff's father, and late husband to the said Mary; and for that purpose the said Mary PRODITORIE, and the said Elizabeth FELONICE, ministered to him such a kind of

On an appeal of treason and felony by the heir against the wife and a stranger for the murder of his father, he may take out

one or two venires at his election; and if the general issue be joined at the bar the same time in which the appellates are arraigned, there is no necessity to file the declaration.

poison



PIGOT  
against  
PIGOT and  
LEWEN.

Jones, 425.  
1. Roll. Ab. 536.  
H. P. C. 182.  
1. Inst. 320.  
1. Mod. 461.  
Co. Lit. 288.  
1. Com. Dig.  
365. 369. 372.  
4. Com. Dig.  
16, 17.  
1. Bac. Ab. 124.  
2. Hawk. P. C.  
243. 301.

poison in a posset, which he, not knowing, drank up, and afterward within such a time died; so the said *Mary* PRODIGIOUS, and the said *Elizabeth* FELONICK, him murdered and killed.

They being hereupon arraigned in the king's bench, pleaded not guilty: and a *venire facias* was awarded to try them at the bar in *Michaelmas Term*, 14. Car. 1.; and after evidence apparent against the said *Mary*, and doubtful against the said *Elizabeth*, the jury found the said *Mary* GUILTY, and the said *Elizabeth* NOT GUILTY.

CHARLES JONES, for the defendant, now moved in arrest of judgment, that there was not any declaration upon the file in the said *Michaelmas Term*, as it ought to be.

But MAYNARD, for the plaintiff, said, that this appeal was arraigned at the bar in *Trinity Term*, 14. Car. 1. and the defendants being at the bar, instantly pleaded thereto the same Term; and so it is well enough without other declaration filed, which is the usual course in this court; and that no other declaration is to be filed: but if they had not pleaded the same Term, or if they had pleaded any other plea than "*not guilty*," so as there had been adjournment to another Term, then the declaration ought to have been filed.—ALL THE COURT were of that opinion.

HODDESSEN, the Secondary, said, that the usual course was so.

An appeal of death may be against one for petty treason, and another for murder, in the same court.

1. Com. Dig.  
366. 368.  
Foster, 323.

A SECOND EXCEPTION was taken, Because there was but one *venire facias*, where there ought to have been several *venire facias* in the appeal; so they are several offenders, especially the one being charged with *treason*, the other with *felony*: and for that purpose vouched the *Old Bk. of Ent.* 46. & 47. and *New Bk. of Ent.* 57.

MAYNARD, for the plaintiff, thereto answered, that the plaintiff might take one *venire facias*, or several *venire facias* for doubt of challenge; and so is 9. *Edw. 4. pl. 27.*

ALL THE COURT were of this opinion. Whereupon it was adjudged for the plaintiff; and judgment was given, that the said *Mary* should be burnt to death (a).

(a) See 30. Geo. 3. c. 48. by which this judgment is abolished.

## CASE II.

James against Tutney.

*Cujus Principium Ante*, Page 497.

In replevin of a distress taken for a penalty under a bye-law, if the defendant make consuance as bailiff of the lord of the manor, and the verdict be found for him, he shall have his costs. Ante, 524. S. C. Jones, 422. 434. Cro. Eliz. 300. 329. Moor, 893. Cro Jac. 520.

THIS Case was now argued at the bench by BERKLEY, Justice, MYSELF, and JONES, Justice.

The sole question was, Whether, as this case is, damages and costs ought to be given to him who justifies this distress as bailiff, being adjudged for him; or, whether the giving of damages and costs be erroneous?

BERKLEY argued, for the defendant in error, that the damages and costs were well given, and no error; for by the 7. Hen. 8. c. 4. it is expressed, "That every avowant, and every other person or persons that make avowry, consuance, or justification as bailiff in a replevin or second deliverance, for any rent, custom, or service, if their avowry, consuance, or justification be found for them, or the plaintiff barred, shall recover costs and damages, as the party should have done if they had

2. Roll Rep. 75. Dougl. 709. note (2). 2 Term Rep. 235.

"recovered."

“recovered.” And he conceived, that by the exprefs words of the statute he ought to have his damages and costs; for he is within the word “customs;” for he distrained for a duty demanded, grounded upon a custom; and if not, yet especially he is within the intent and equity of the statute: for in statutes, although particulars be enumerated, yet it excludes not, but that whatsoever is within the same reason and equity shall be taken to be within the statute. As the statute of *Westminster* 2. *de donis conditionalibus* expressed divers kinds, yet other gifts not mentioned are within the said statute; so the statute 27. *Hen. 8. c. 10.* of jointures, enumerates divers particular estates which are jointures; yet in *Vernon’s Case (a)*, other estates within the same reason are within the statute: also in the exposition of statutes, when the words make provisions for certain persons, yet they shall be extended by equity to others; as the statute of Bigamy, and the statute of 23. *Hen. 8. c. 15.* of Costs, which are expounded larger than the words: so *Partridge’s Case (b)*, lease for years is within the statute of Champerty; and the YEAR-BOOK 19. *Hen. 8. c. 11.* is exprefs, that the defendant shall recover damages upon demurrer, yet it is out of the words: and here as this case is, a distress being for a customary duty, he conceived, that damages and costs are recoverable, as well by the 7. *Hen. 8. c. 4.* as by the 21. *Hen. 8. c. 9.* which adds, “That the avowant for *damage fasant* shall have costs.” But he held, that if the lord avow for relief, or *pro valore* *meritagii*, as he may, yet that is out of the statute; for they are not services and customs, but flowers or fruits fallen from them, and therefore they are out of the statute; and he cited for this 26. *Hen. 8. c. 8.*; and an avowry for an amercement in a leet is out of the statute, because it is not grounded upon custom: and for proof thereof he cited *Grey’s Case (c)*, and *Greisley’s Case (d)*. Whereupon he concluded, that judgment should be affirmed.

JAMES  
against  
TUTNEY.

Carth. 179.  
Ld. Ray. 788.  
2. Com. Dig.  
548.

Co Lit Sec. 21.

3. Com. Dig.  
115.

11. Co. 73 b.

The same day I argued the same way; for this being a general statute, ought to be taken liberally to remedy the general mischief, which was at the common law, that the avowant distraining justly, should be at the charge to defend his act in distraining, and should not be allowed costs nor damages, to the encouragement of those who tortiously denied their duties, suing out replevins merely for vexation sake, and in discouragement of those who distrained, who by the common law had not either costs nor damages allowed them for their lawful distresses; wherefore to remedy this mischief were the statutes of 7. *Hen. 8. c. 4.* and of 21. *Hen. 8. c. 19.* made, which ought liberally to be construed for advancing the remedy, and suppressing the mischief, as in *Heydon’s Case (e)*. And shall be construed according to the intent of the makers, which intended by 7. *Hen. 8. c. 4.* to give costs to the defendant where he prevailed, as the plaintiff should have had, if he had recovered: although they mention rents, customs, and services only, and the preamble extends only to these rents, customs, and services which lie in tenure, yet the second part, whereupon this opinion is grounded, is not such rents, &c. referring to the preamble, but

(a) Co. 1, 2. a.  
Plowd.  
3. Co. 78.

(d) 8. Co. 38. 41. a.  
(e) 3 Co. 7.

JAMES  
against  
TUTNEY.

Ante, 533.

2. Cro. 28.

2. Cro. 330.

all rents, customs, and services; so all manner of customs and services are within the intent of the statute. And I conceived the cases concerning distresses for relief, *valore maritagii*, and for amercements in leets, to be likewise within the services of 7. Hen. 8. c. 4. and 21. Hen. 8. c. 9. because they are in nature of services, and to be expounded as distresses for customs and services; and therefore in the case of *Sheppard v. Mackworth* (a), where the bailiff of Lord Berkeley distrained for relief, and the question was, Because the land had been in ward to the queen by reason of other lands held of her majesty by service *in capite*, whether the heir should pay relief to other lands at his full age? it was adjudged, that he should; there damages were given to the jury by the avowant: and although POPHAM advised, because it was a new case, that the avowant should take his judgment for the relief, and release the damages, which he did, yet that doth not prove that no damages were due, but that it was doubted only; and there is not any resolution nor opinion to the contrary in that case (b). And all the precedents are, that damages and costs have been allowed to avowants in such cases; and therefore I concluded, that judgment should be affirmed.

JONES, Justice, argued to the contrary, and said, We are here upon the exposition of the statutes; and multitude of precedents will not serve for the exposition of the statutes, unless after debate in court they be mentioned to have been so adjudged; but no such precedent hath been shewn, but a multitude which have passed *sub silentio* without debate. And for the matter he held, that it was out of the words and intent of the statute; for the first part of the statute is "Where a distress is for rents, customs, or services in lands, &c." that the avowry shall be upon the land;" so that extends only to such rents, customs, and services by which the land is held: and the second part of the statute of 21. Hen. 8. c. 9. which is *quasi* an exposition of the former, is, "In such avowry for any rents, customs, and services," those words are to be applied to former rents, customs, and services; and although the words be general, and say not "such rents, customs, and services," yet it is to be applied to the former. And where the statute 21. Hen. 8. c. 19. intends further remedy than was before, it is by express words, "upon distresses for damage *feasant* and other rents," which extend to rent-charges, but no mention of distresses or avowry for any other cause. And in *The Marquis of Winchester's Case* (c), a case is cited upon the statute of Rich. 2. c. 3. of a writ of error, where, upon recovery against a tenant for life, it was held, it should not extend to other estates; and the statute of 4. Jac. 1. c. 3. which says, that "no costs shall be given in other causes than such as are within the statute of 21. Hen. 8. c. 15." shews, that without an act of parliament costs shall not be given in other causes: and for the case cited here in an avowry for a relief damages were given, and for doubt of error released by the avowant, it doth appear of record that they were released; therefore it shall be intended they were disallowed by directions

(a) Cro. Jac. 28.

(c) 3. Co. 1.

(b) See Co. Ent. 570. 573. Greisley's Case. 8. Co. 38.



the Court: and for the cases of damages and costs given in avowry for amercements in leets, he knew, that in the 35. *Eliz.* in an avowry for an amercement in leet, damages and costs being given, judgment was reversed for that cause in this court. Therefore he concluded, that judgment should be reversed.

JAMES  
against  
TUTNEY.

NOTE, In his argument he said, that in *Lord Say's Case* (a) it was adjudged, that *scandalum magnatum* was out of the statute of 21. *Jac.* Neither the statute of 21. *Jac.* 1. c. 16. of Limitation of Actions upon the Case, and out of the 1. c. 16. nor the statute 27. *Eliz.* c. 8. of Errors in the Exchequer Chamber, be- 27. *Eliz.* c. 8. cause not mentioned, although it be included in the words, "Ac- extends to ac- tions of *scandal.* tions upon the case." *magnatum.*

1. Sid. 143. 3. Mod. 41. 2. Show. 506.

(a) Ante, 140.

M m 2

Easter

Easter Term

Case in the King's Bench

John Bannister vs. John Jones

vs. William Jones

vs. Robert Bannister

vs. John Bannister



U  
of  
Hu  
year  
pro  
acc

fail  
w  
an  
vi  
ho  
th  
or  
r  
w  
p  
2  
f  
t

an  
w  
to  
all  
with  
a  
small  
piece  
of  
the  
window  
and  
the  
door  
is  
open

## Easter Term,

15. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*} *Justices.*Sir John Banks, *Knt. Attorney General.*Sir Edward Littleton, *Knt. Solicitor General.*

## Memorandum.

CASE 1:

UPON Saturday the 4th of May 1639, anno 15. *Caroli regis*, Serjeant Reve, of the county of *Norfolk*, was sworn one of the Justices of the common pleas, succeeding SIR RICHARD HUTTON, late second Justice of the said court, who died at Serjeants-Inn, in *Chancery-lane*: he was a grave, learned, pious, and prudent Judge, and of great courage and patience in all his proceedings.

## Cook's Case.

CASE 2.

COOK was indicted for the murder of *Marshal*. Upon his arraignment, he pleaded not guilty; and it was found, that the said *Marshal* was a bailiff to the sheriff of *Somerset*, and had several warrants upon several *capias ad satisfaciendum* against the said Cook and his father, directed to him and other bailiffs; and that they, by virtue or colour thereof, entered into the said Cook's stable and out-house, and hid themselves there all night; and at eight of the clock the next morning came to Cook's dwelling-house, and called him to open his doors and suffer them to enter, because they had such warrants upon such writs, at the suit of such persons, to arrest him, and willed him to obey them. But the said Cook commanded them to depart, telling them, they should not enter. And thereupon they brake a window, and afterwards came to the door of the said house, and offered to force that open, and brake one of the hinges thereof. Whereupon the said Cook discharged his musquet at the said *Marshal*, and stroke him, of which stroke the day following he died. The doubt was, Whether upon all this matter he be guilty of murder or manslaughter?

And it was now argued by ROLLE, for Cook, that it was not murder; for although a bailiff were slain, yet it was by his own procurement in doing an unlawful act, viz. in breaking the window and door, and attempting to enter and serve process, which is not lawful for a personal duty, unless in the king's case; and for that purpose he cited 5. Co. 91. b. 92. *Seamain's Case*. 13. *Edw.* 4.

Cowper, 3. 1. Hawk. P. C. 108. 130. 2. Hawk. P. C. ch. 14. 4. Bl. Com. 27.

And

To kill a sheriff's officer voluntarily while he is attempting to break into a house for the purpose of executing civil process, is manslaughter, and not murder; for it is not lawful to break open doors for such purpose, and every man has a right to defend his own house.

Ante, 372.

W. Jones, 429. Sum. 46.

1. Hale, 42. 458.

2. Hale, 117.

470.

5. Co. 93.

6. Mod. 173.

Ld. Ray. 1028.

Foster, 311. 319.

19. St. Tr. 462.

4. Bl. Com. 27.



## COOK'S CASE.

2. Cro. 280.  
Ante, 183.

(a) 5. Co. 92. b.  
Cro. Jac. 486.  
Cro. Eliz. 909.  
Moor, 668.  
Yelv. 28.  
March. 4.  
Jones, 430.  
Bulst. 46.  
Dalt. 350.  
Hob. 62. 263.

If a man, intending to kill a thief or a house-breaker in his own house, happens by mistake to kill one of his own family, it cannot be imputed to him as a criminal action.

March. 5.  
W. Jones, 429.  
Plowd. 343.  
4. Bl. Com. 27.  
Kely, 136.  
1 Hale, P. C. 39.  
1 Hawk. P. C. 110. 117.

And after argument at the bar, ALL THE JUSTICES *seriatim* delivered their opinions, that it was not murder, but manslaughter only; for though he killed a bailiff, yet he killed him not in duly executing process: for it is not murder, unless there be *malitia praecogitata*, or *malitia implicita*; as to murder one suddenly, or in resistance of an officer doing his office; but that last ought to be where he is duly executing his office, by serving the process of law, wherein he is assisted *cum potestate regis et legis*: but here this bailiff was slain in doing an unlawful act, in seeking to break open the house to execute process for subject, which he ought not to do by the law; and although he might have entered if the door had been open and arrested the party, and it had been lawful, yet he ought not to break open the house, for that is not warranted by law (a); and especially lying there in the night, and in the morning breaking the window and offering to force the door, which is not sufferable; for under colour thereof one may enter who hath not any such authority; and every one is to defend his own house. Yet THEY ALL HELD, that it was manslaughter: for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter.

Foster, 319. Loft, 374. Cowper, 2. 3. Bac. Ab. 746.

But JONES said, that it was resolved by the Chief Justice and himself, and the Recorder of London, at the last sessions at Newgate, in the case of one William Levett, who was indicted of the homicide of a woman called Frances Freeman, where it was found by special verdict, that the said Levett and his wife being in the night in bed and asleep, one Martha Stapleton, their servant, having procured the said Frances Freeman to help her about house-business, about twelve of the clock at night going to the doors to let out the said Frances Freeman, conceived she heard thieves at the door offering to break them open; whereupon she, in fear, ran to her master and mistress, and informed them she was in doubt that thieves were breaking open the house-door. Upon that he arose suddenly and fetched a drawn rapier. And the said Martha Stapleton, lest her master and mistress should see the said Frances Freeman, hid her in the buttery. And the said Levett and Hellen his wife coming down, he with his sword searched the entry for the thieves: and she, the said Hellen, espying in the buttery the said Frances Freeman, whom she knew not, conceiving she had been a thief, crying to her husband in great fear, said to him, "Here they be that would undo us." Thereupon the said William Levett, not knowing the said Frances to be there in the buttery, hastily entered therein with his drawn rapier, and being in the dark and thrusting with his rapier before him, thrust the said Frances under the left breast, giving to her a mortal wound, whereof she instantly died: and whether it were manslaughter, they prayed the discretion of the court.—And IT WAS RESOLVED, that it was not; for he did it ignorantly without intention of hurt to the said Frances: and it was there so resolved.

(a) But to execute a *capias utlagatum*, the house of the outlaw, it is said, may be broke open. 2. Hale, 262. 9. Co. 91. Bulst. 146. Moor, 606. 4. Leon. 40. 3. Bac. Ab. 746.

But here they held clearly, that it is manslaughter, because he, COOK'S CASE.  
 seeing and knowing him, shot at him voluntarily and slew him.—  
 Whereupon they all resolved, it was not murder, but homicide only.  
*Vide 13. Edw. 4. pl. 9. 18. Edw. 4. pl. 4.*

## Perkinson against Gilford and Others.

CASE 2.

Hilary Term, 14. Car. 1. Roll

**D**EBT against Gilford and others, executors of *William Collier*,  
*esq.* late sheriff of the county of *Dorset*, for two-and-twenty  
 pounds ten shillings. Whereas the plaintiff had recovered in the com-  
 mon pleas against the executor of *William Pawlett* a debt of one hun-  
 dred pounds, and two-and-twenty pounds ten shillings for damages,  
 the debt and damages *de bonis testatoris*, *si, &c.*; *et si non*, the said two-  
 and-twenty pounds ten shillings *de bonis propriis*: and the record be-  
 ing removed into this court, the plaintiff had a *feri facias* directed to  
 the said *William Collier*, sheriff of *Dorset*, for the levying of the said  
 two-and-twenty pounds ten shillings damages of the goods of the said  
 executor: and by virtue thereof he levied the two-and-twenty pounds  
 ten shillings, and afterwards died without paying, &c.: whereupon  
 he demanded it of the said executors, and they had not paid it, *per*  
*quod actio accrevit*. The defendants pleaded *non debet*; and found  
 against them.

*Ante*, 177.  
*S. C. March*, 13.  
*Jones*, 430.  
*1. Roll. Ab.* 598.  
 921.  
*Cro. Eliz.* 566.  
*Lut.* 588.  
*1. Burr.* 27.

MALLET moved in arrest of judgment,

FIRST, Because the recovery of the said debt of 122l. 10s. is in  
 the common pleas, and the execution by *feri facias* is in the king's  
 bench, and he doth not shew how he came out of the common pleas  
 into this court to have execution.—*Sed non allocatur*: for in the re-  
 cord it is mentioned that it is here duly, which shall be intended to be  
 by a writ of error, or other due means: and it is not necessary to  
 shew all the circumstances how it came hither.

In debt for mo-  
 ney levied under  
 a *fi. fa.* in *B. R.*  
 on a judgment  
 in *C. B.* it is  
 sufficient to al-  
 ledge that the  
 record was duly  
 removed.

S. C. March. 13. S. C. Jones, 430. 2. Mod. 71. Lutw. 120.

THE SECOND OBJECTION, Because it doth not appear that upon  
 the *feri facias* awarded it was ever returned served here, so as there is  
 no record to charge him; for if there were any record appearing that  
 he had levied it, then peradventure he might charge the sheriff.

THE THIRD OBJECTION, Because he chargeth him in action of  
 debt, whereas there was never any such action brought before; but  
 (if it had appeared by the record that the money was levied) he might  
 have had accompt, or action upon the case, or a *scire facias*, but ne-  
 ver an action of debt.

Debt lies on a  
 judgment re-  
 covered.  
*Hob* 206.  
*Noy*, 22  
 2. Saund. 343.

THE FOURTH OBJECTION, That although the action lies  
 against the sheriff himself, yet it lies not against his executors: for  
 the non-payment is a personal wrong, wherewith his executors are  
 not chargeable, as debt upon an escape lies not against a sheriff's exe-  
 cutors.

Debt lies against  
 the executors of  
 a sheriff for the  
 non-payment of  
 money levied on  
 a *feri facias*.

But BERKLEY, JONES, and MYSELF (*BRAMPSTON being absent*)  
 agreed, that the action well lies: for to the second and third objec-  
 tions the *feri facias* being duly executed, and the money levied by  
 the sheriff, the executor of *Pawlett* the defendant in the first action  
 is discharged, and may aver and plead it against any new execution  
 to be awarded against him, as 21. *Hcn.* 8. fol. . proves; and the  
 Sheriff

*Moor*, 468.  
*9. Co.* 90.  
*Savil*, 40.

PERKINSON  
against  
GILFORD,  
and OTHERS.

Cro. Jac. 515  
Hob. 206.  
Dyer, 22.  
1 Roll Ab. 598  
2 Roll Ab. 410.

9 Co. 50.  
Palm 330.  
Pop. 31.  
Raym 57. 71.  
Savil, 40.

(2) See the case  
of Hambly v.  
Trott, Cowp.  
372.

sheriff is chargeable for the money to him who recovered it: and as it is allowed that he might be chargeable in accompt, as MALLETT said, so it is agreed he may be chargeable in debt; for the plaintiff might have either debt or accompt, as appears in 28. Hen. 8. and 4. Co. 94. *a. Slade's Case*. And as, BERKLEY said, the case is in THE YEAR-BOOK 1. Hen. 7. that a collector by acceptance of a talley is chargeable in debt, so the sheriff, having levied the money, is chargeable for so much in debt to him who recovered. And MALLETT confessed, that in the common pleas it was adjudged, where the sheriff returned a *fieri feci*, debt lieth against him. And BERKLEY said, it was all one when he receives the money, for he is then liable, although he returns not the writ; for his not returning shall not aid nor excuse him. And for the fourth objection they held, that the sheriff's executors are as well chargeable as himself: for, as JONES said, there is a diversity where the sheriff is chargeable in his life for a personal tort or misfeasance; there his person is only chargeable; and there *actio moritur cum persona*: but where he is chargeable for levying of money, and not paying it over, that is for a duty; and there, if he dies, his executors are chargeable as well as himself; which is the reason, that for an escape by the sheriff his executors are not chargeable: but there would be a great mischief if the sheriff's executors should not be alive in this case; for the plaintiff hath a duty due to him from the executors of Pawlett the first defendant, who paid it to the sheriff, and thereby was discharged thereof: and if the plaintiff should not recover it against the sheriff's executors, he should be without remedy, which the law will not suffer (a).—Wherefore they all agreed, that the action well lay. And rule was given to have judgment entered, unless, &c.

## CASE 4

## Goodwin against Anne West.

Ante, Page 522.

On 5. Eliz. c. 9. of judgment, that the declaration was not good: FIRST, Because he doth not shew, that he left the writ with the defendant: for the statute is, "If they be served with process;" and it is not serving of process when the writ is not left, although it be read unto the party, and a note left of the cause, place, and day.—*Sed non allocatur*: for JONES, BERKLEY, and MYSELF held it to be a sufficient serving of the process within the intent of the statute, and according to the usual course and practice; for there may be two, three, or four names of witnesses in one writ (and so there be usually), and he cannot leave the writ with every one of them, and it would be very chargeable unto the subject to have several writs for every witness.

Jones, 430. March 18. 5. Mod. 355. 2. Bac. Abr. 294. Dougl. 558.

A witness who is served with a subpoena and a scilling is bound to attend.

B. R. H. 313. Black. 36. Strange, 510.

1150. 2. Ld. Raym 1529. 2. Hawk. P. C. 610.

THE SECOND EXCEPTION, Because he sheweth that he paid to her twelvecence for her pains, and promised to pay to her as much more as she would require, when she came to be a witness at Gloucester, which is not sufficient, according to the statute: for the statute is, that "he shall pay sufficient charges for her travel, according to the distance of the place, and the quality of the person so to be

"paid."



"paid;" and the witness is not bound to accept his promise for the residue.—*Sed non allocatur*: for when it is alledged that he paid to her twelvenpence, and promised to pay the residue when she came to Gloucester, and she accepted thereof, she is then bound to come, for she hath accepted of his promise for the residue; otherwise she might have refused, and not told him she would accept of his promise.

GOODWIN  
against  
WEST.

THE THIRD EXCEPTION, Because the plaintiff doth not shew, that he is endamaged by her non-appearance, *viz.* that the verdict passed against him, or that he was enforced to be nonsuited, or any other grievance; for so is the statute, that "the party grieved shall have his part of the ten pounds, and his further damages taxed by the Justices before whom, &c." But GRIMSTON, *for the plaintiff*, answered, that the action being brought only for the ten pounds, and not for further damages, it is well enough; and the ten pounds is due for her non-appearance to the king and the party.—But ALL THE JUSTICES held, that the declaration was ill for this cause; for there ought to be a party grieved by the non-appearance, otherwise there is no cause of forfeiture: and so is the express scope and words of the statute. Wherefore it was adjudged for the defendant, *absente ERAMPSTON*.

In an action on the 5. Eliz. c. 9. against a witness for non-appearance, the plaintiff must shew a damage for the want of the witness's testimony.

Ante, 522.  
Jones, 431.

### Bradsey against Clyfton.

CASE 5.

DEBT upon an obligation of one hundred pounds for not performing of an arbitrament, where an award was, That the defendant should acquit and discharge the plaintiff concerning a bond of one hundred pounds, wherein the plaintiff and defendant were jointly bound for the payment of fifty pounds to J. S. The defendant demurred.

ROLLE now shewed for cause, that the arbitrament was void, to award that he would acquit and discharge him of a bond made to a stranger; for it is not in his power to procure a discharge (a).

But THE COURT held, that the party may well acquit and discharge, &c. if the fifty pounds be payable at a future day, as it is here to be intended it was.

1. Mod. 9. 3. Mod. 331. 2. Keb. 546. Lutw. 524. Carth. 378. 1 Bac. Ab. Awards, 105.

A SECOND EXCEPTION was taken, Because the submission is, to stand to the award, "so as it be made under hand and seal, ready to be delivered to the parties:" and he saith, that they made the arbitrament before the day (*viz.* such a day) under their hands and seals; and he doth not say "ready to be delivered."

But ALL THE COURT held, it was well enough, for the words are not "and to deliver," but "ready to be delivered;" and when it is under hand and seal, it is intended "ready to be delivered:" and the declaration being read, it was expressly that it was "ready to be delivered." Whereupon it was adjudged for the plaintiff.

March. 18. Hard. 399. 3. Mod. 331. Carth. 378. Lutw. 524. —d Ray. 247.

(a) *Vide* 4. Ann. c. 15. s. 12.

Daly

## CASE 6.

## Daly against Bellamy and Others.

A defendant shall not have costs on an attaint brought by a plaintiff, although the verdict is affirmed

S. C. March. 24.

S. C. Jones, 432.

2. Com. Dig.

553.

**A**TTAINT brought by the plaintiff in trespass of battery. The verdict was affirmed.

MAYNARD now moved, *for the defendant*, upon the statutes of 21. Hen. 8. c. 9. and 23. Hen. 8. c. 15. that the defendant should have costs: because the plaintiff, if he had avoided the verdict by attaint, should have had costs.

But ALL THE COURT agreed (*absente BRAMPSTON*), that he should have no more costs: for if the first verdict had passed for the plaintiff, whereby he should have had costs, or if the said verdict having passed against him, thereupon he had brought this attaint, and the jurors had been attainted, he should have had such costs as he should have had in the first action, if it had been found for him; but he should not have had more costs in respect of the attaint: so *à converso*, where the first verdict passed for the defendant, and he had costs, if the verdict be impeached by attaint, or be affirmed, he shall have no more costs, but only those which were given upon the first verdict. And HODDESSEN said, the practice of the Court was always so.

## CASE 7.

## Daniel against Count de Hertford.

Trinity Term, 14. Car. 1. Roll 543.

*Qu.* If in trespass, a justification that the prior of D. was seised in fee of the pasturage in the place where, for all his sheep *levant et couchant* at all times of the year, is good, without shewing either a grant or prescription.

Co. Lit. 122.

4. Co. 37. 97.

1. Mod. 74.

1. Bac. Ab. 389.

**E**RROR of a judgment in the common pleas in trespass, for depasturing his close with sheep. The defendant justifies, Because the prior of D. was seised in fee of such a great close in D. and was seised in fee of the pasturage in the place aforesaid, for all his sheep *levant et couchant* in the said great close at all times of the year. The plaintiff thereupon demurred; and it was there adjudged for the defendant. MAYNARD, *for the plaintiff* in the writ of error now assigns for error the point of the judgment: FIRST, Because the defendant entitles the prior neither by prescription nor grant: and this being a profit *a prendre*, in *alieno solo*, none can entitle himself by the course of the common law thereunto without grant or prescription; and this pasturage claimed, is but as common in its nature. SECONDLY, That this plea is not aided by the statute of 31. Hen. 8. c. . for that gives nothing to the king but what the prior lawfully had; and therefore it ought to be shewn how the prior was entitled thereto.

ROLLE, *for the defendant* in the writ of error, said, that the plea is good; and was so adjudged upon demurrer in the common pleas; and that it was a good plea, although it were pleaded at the common law before the statute: for this pasturage claimed for sheep *levant et couchant* upon the defendant's land is common appendant, and cannot be severed from the soil by grant; and then to make prescription thereto is not good, as it is 4. Hen. 6. pl. 13. and 8. Edw. 4.: and if it were not good at the common law, yet the statute aids it, in pleading that the prior was seised thereof in fee at the day of the dissolution; otherwise it would be very michievous, the priors and other religious persons at the time of their dissolution seeking to deface and suppress all their deeds, and to conceal their lands and estates.

which they then held; and therefore such general averments had been allowed, as it is held in the case of the *Archbishop of Canterbury* (a), and in the case of the *Abbot of Strata Marcella* (b).

THE COURT inclined to that opinion; but because it was depending upon demurrer in the common pleas, they would not hastily proceed. Wherefore day was given until the next Term.

(a) 2. Co. 48.

(b) 9. Co. 24.

DANIEL  
against  
COUNT DE  
HERTFORD.

2. Co. 48. b.  
Cro. Jac. 453.

## The Case of Edwards and Rogers.

CASE 8.

*Ante, Page 254.*

THIS Case was now argued by MAYNARD for the plaintiff, and A grandfather by FARRER for the defendant. And BERKLEY and MYSELF levies a fine of the land of B. delivered our opinions, that this fine by Andrew, the uncle of William the idiot, who was seised of the inheritance (he dying in the life of William, so as nothing ever attached in him), shall never bar his son, being heir also to B. William the defendant, who was grandchild of the said Andrew, because he claims nothing by or from him, but only from William the nephew of Andrew, who survived the said Andrew: and he makes his title as heir to the said William the nephew who was last seised, not making therein any mention of Andrew, as of one from whom he derives his pedigree from his grandfather. claims, but only as drawing his descent from him by way of pedigree, and not by way of title: and therefore it was compared to *Hobbes' Case*, Co. Lit. 8. a. where the father is attainted of felony, having issue two sons, and the one of them purchaseth lands, and dies without issue, it shall not bar the other son to claim as heir to his brother; and the corruption of blood in the father shall not hurt him (a). *Vide ante, 524.*

(a) 4. Leon. 5. Palmer, 19. Vent. 418. 425.

BERKLEY compared it to the case in 10. Eliz. Dyer, 274. where there were two brothers: the eldest hath good cause *del petition de droit*; the youngest son hath issue a son, and is attainted of felony, and is executed. The eldest son dies without issue; the issue of the younger son is barred of the petition, because his blood is corrupt, and he cannot claim but by mentioning his father, and from him, &c. But here forasmuch as he doth not claim nor derive by him who levied the fine, we held, he should not be barred by the fine.

But JONES conceived, that in regard Andrew is bound, and cannot claim against that fine, and his grandchild cannot claim, but he ought to make mention of him that he is also barred; and as his grandfather, if he had survived, had been barred, so also shall his grandchild, who of necessity ought to mention him. Whereupon it was adjourned.

2. Bac. Abr. 585.

3. Com. Dig. 353.

2. Hawk. P. C. 648.

Cruise on Fines, 159.



## CASE 9.

## Cooper's Case.

A master, lodger, or sojourner in a house, who kills a person breaking into it with intent to commit burglary or homicide, are exempt from guilt by 24.

Hen 8 c. 5.

Puff. 1. 2. c. 5.

Bracton, 155.

1. Hale, 487.

5. Co. 93. a.

1. And. 41.

Kely 51.

26. Aff. 23.

Vent 159.

Raym. 212.

Prin. P. L. 212.

4. Bl. Com. 180.

1. Hale, P. C.

487.

1. Hawk. P. C.

108.

COOPER being indicted in the county of Surry of the murder of *W. L.* in *Southwark*, with a spit, he pleaded not guilty; and upon his arraignment it appeared, that the said *Cooper*, being a prisoner in the King's Bench, and lying in the house of one *Anne Carricke*, who kept a tavern in the Rules, the said *W. L.* at one of the clock in the night, assaulted the said house, and offered to break open the door, and brake a staple thereof, and swore he would enter the house and slit the nose of the said *Anne Carricke*, because she was a bawd, and kept a bawdy-house. And the said *Cooper* dissuading him from those courses, and reprehending him, he swore, that if he could enter he would cut the said *Cooper's* throat: and he brake a window in the lower room of the house, and thrust his rapier in at the window against the said *Cooper*, who in defence of the house and himself thrust the said *W. L.* into the eye, of which stroke he died.

The question was, Whether this were within the statute of 24. Hen. 8. c. 5.?

THE COURT was of opinion, that if it were true he brake the house with an intent to commit burglary, or to kill any therein, and a party within the house (although he be not the master, but a lodger or sojourner therein) kill him who made the assault, and intended mischief to any in it, that it is not felony, but excusable by the said statute of 24. Hen. 8. c. 5. which was made in affirmance of the common law: wherefore the jury were appointed to consider of the circumstances of the fact; and they being a substantial jury of Surry, found the said *Cooper* not guilty upon this indictment: whereupon he was discharged.

## CASE 10.

## Sir Martin Lyfter against Home.

TROVER for a hawk *ut de bonis propriis* is good after verdict, for it shall be intended to have been reclaimed.

1. Roll. Ab. 5.

Cro. Jac. 46.

262.

Moor, 691.

3. Lev. 336.

Cro. Eliz. 125.

Gwen, 93.

1. ut, 1359.

1. Com. Dig.

2. 9.

5. Bac. Ab. 263.

TROVER AND CONVERSION of an hawk, called a ramish faulcon, supposing that he was possessed of that hawk *ut de bonis propriis, et casualiter omisit*, and that she came to the defendant's hand; and he knowing her to be the plaintiff's hawk, yet being required had not delivered her, but converted her to his own use. Upon not guilty pleaded, a verdict was found for the plaintiff.

WHITLOCK moved in arrest of judgment, that the declaration was not good to maintain this action, Because he doth not shew that she was a reclaimed hawk, and made tame, nor that she had bells or varvels to shew who was her owner: and a ramish hawk is properly such an one as liveth *inter ramos*, and from thence hath its name; and therefore relied upon THE BOOK 14. Eliz. Dyer, 306. *Sir Richard Fines' Case*.

JONES and BERKLEY inclined to this opinion.

But I conceived the declaration to be good enough, because it is aided by the allegation, that he was possessed of the said hawk *ut de bonis propriis*; and that the defendant, knowing her to be

this hawk, converted her, &c. And it differs from the case of *Sir Richard Fines*; for there, although the said exception was taken to the count, yet it doth not appear but that the count was there held to be good enough.—But because the defendant's plea was held good, it was adjudged against the plaintiff, not for the insufficiency of the count, but upon demurrer upon the plea in bar, which was held sufficient. *Vide 1. Co. 17. The Case of Swans*, of what beasts and birds a man may have property.

This case was afterwards moved again in *Hilary Term, 15. Car. 1.* and then, because upon divers former motions the Court was always divided in opinion, the plaintiff, for his greater expedition, consented that judgment should be entered against him:—so the judgment was entered, *quod nihil capiat per billam*.

THE PLAINTIFF brought a new action in the common pleas, and amended the fault in his declaration, and had judgment by confession of the action, and only three pounds damages given by a *London* jury; and thereupon HENDEN moved in this court to have costs in his former action.—But because the verdict was found for the plaintiff, and upon exception to the declaration judgment was given against him, THE COURT held, that no costs should be given.

SIR MARTIN  
LYSTER  
against  
HOME.

If judgment be  
arrested, the  
plaintiff in a  
new action shall  
not recover the  
costs of the first.  
Ante, 175.

Cro. Jac. 159.  
1. Hetley, 50.

2. Com. Dig. 549. 1. Bac. Ab. 511.

Trinity

# Trinity Term,

15. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

CASE 1.

Swyft, Subchanter, and one of the Vicars Choral of Litchfield, *against* Eyres and Others, Lessees of Sir Edward Peto.

Trinity Term, 12. Car. 1. Roll

The grant of a remainder or reversion to commence *in futuro*, is not good.

Ante, 362.

March. 31.

Jones, 435.

1. Roll. 828.

2. Roll. 52. 3.

**D**EBT upon the statute 2. *Edw. 6. c. .* for not setting forth the tithes of one hundred and forty acres of lands in *Chesterton*, whereof the said subchanter and vicar were proprietors, before they carried away their corn, for which the plaintiff demands the treble value, *viz.* one hundred and thirty-five pounds.

Upon *non debet* pleaded, it was found by special verdict, that the subchanter and vicars choral of *Litchfield*, being seised in fee of the rectory appropriate of *Chesterton*, within which the said one hundred and forty acres of land lay and were parcel, in the twenty-ninth year of *Henry* the eighth, by indenture demised and let to *John Peto* the tithes of the rectory for forty-two years (with an exception of the privy tithes, the four offering days, and the tithes of a meadow called *The Parson's Hay*, and the presentation to the vicarage of *Chesterton*) rendering 5l. 16s. 8d.: and that afterwards, by indenture tripartite dated 26 *February*, 5. *Edw. 6.* betwixt the subchanter and vicars of the first part, *Richard Woodward* of the second part, and *John Woodward*, father of the said *Richard Woodward*, on the third part, reciting the said lease of 29. *Hen. 8.* and that the said *John Woodward* had bought the said lease of the said *John Peto*, they confirmed and ratified the said lease; and further, for a great sum of money to them paid, &c. demised and granted to the said *Richard Woodward* and *John Woodward* all the said tithes, with the tithe hay (except the said privy tithes, and the said four offering days, and the presentation of the clerk, &c.), "HABENDUM from and after the said term and determination thereof and the years in the said indenture comprised, in manner and form following, that is to say, to the said *Richard Woodward*, for one month after the end and determination of the said term and years within the indenture comprised and after the said month fully determined, to have and to hold the said tithes and premises (except before excepted) to the said *John Woodward*, his heirs, and assigns, for ever, rendering 6l. 4s. 4d. *per annum.*" And they find, that by virtue of this grant the tithes renewing of the tenements in *Chesterton* aforesaid had been enjoyed



enjoyed always after this grant: and further, that afterward, viz. on the 23d March, 2. & 3. Philip & Mary, the said subchantor and vicars choral made another indenture, which they find *in hæc verba*, mentioning, "that for divers great sums to them paid by *Humphry Peto*, and the rent therein afterwards to be reserved, they did demise and grant to the said *Humphry Peto* all that their glebe lands lying in *Chesterton*, viz. seventy-eight acres of land, and also the demesnes of the said seventy-eight acres, with all profits, commodities, tithes personal and predial, whatsoever they be or shall fortune to be, belonging to the said subchantor and vicars, as parsons and proprietaries of the parish-church of *Chesterton* afore said, as the tithes of pig, goose, lamb, wool, calf, fish, swans, wood, and all other tithes whatsoever; AND ALSO the tithes of the said seventy-eight acres, all which lately were in the ferm or occupation of *Margaret Peto*, widow, deceased; AS ALSO all other their rights and interests, tithes, commodities, and profits, in and to the same, which to them do belong, or appertaining to the parson or parsons and proprietaries of the parish-church of *Chesterton* afore said, (the said yearly rent hereafter reserved, and the nomination and presentment of the priest or curate there, with all offerings and offering days, and privy tithes, as well of the manor place as of other the inhabitants there, always excepted and reserved to them and their successors for ever), HABENDUM to him and his heirs for ever, rendering annually to them and their successors six pounds seventeen shillings four-pence." And it is found, that the tithes of these lands were never in the tenure of the said *Margaret Peto*; but they found, that some tithes and lands were in the tenure of the said *Margaret Peto*: and it was also found, that *Sir Edward Peto* is son and heir of the said *Humphry Peto*, and that the defendants were occupiers of the lands in the declaration mentioned, and carried the corn growing thereupon without setting out of the tithes. *Et si super*, &c. the Court shall adjudge it for the plaintiffs, they find for them, and that the tithes carried away were worth thirty pounds *per annum*, and the treble value is ninety pounds; for the residue, they find for the defendants.

This case was argued at the bar by THE SOLICITOR GENERAL, ROLLE, and MAYNARD, for the plaintiffs, and by THE ATTORNEY GENERAL, SERJEANT HENDEN, and GRIMSTON, for the defendants; and this Term it was argued at the bench, and two questions were made:

FIRST, Whether the deed of the fifth of *Edward* the sixth be good to convey the inheritance to *John Woodward*?

SECONDLY, If the first indenture be not good, Whether the second indenture of 2. and 3. *Philip & Mary* be sufficient to convey them, against the subchantor and vicars, to *Humphry Peto*? for if any of them be good, then the plaintiffs have no title.

And as to the first, ALL THE JUSTICES argued for the plaintiffs, that they have a good title, notwithstanding this indenture; for this indenture is merely void, because it is to convey an inheritance *in* I. Roll. 828. *feuturo*; for the month is not to begin until the forty and two years be expired: and it is a grant of *interesse termini*, and no grant of a reversion;

SWIFT, &c.  
against  
ETHEL, &c.

SWIFT, &c.  
against  
EVANS, &c.

reversion; for the inheritance is granted therein, which was not in lease before; and as it is an *interesse termini* for the tithe hay, so ought it to be of the residuum, for there cannot be fraction of the estate; and then being only an *interesse termini* in *Richard Woodward*, there cannot be a grant of a remainder or reversion to commence in future. And to prove this, see 5. Co. 25. *Buckler's Case*; and 8. Hen. 7. 3. et 38. Hen. 6. 34.

A lease of "all  
" that glebe  
" land lying in  
" A. viz. se-  
" venty-eight  
" acres of land,  
" and also all  
" the tithes of  
" the said se-  
" venty-eight  
" acres, all  
" which lately  
" were in the  
" farm or occu-  
" pation of B." is sufficiently certain to pass the tithes, although they never were in the occupation of B.; for the words "all which were lately, &c." shall be taken as an explanation, and not as a restriction.  
Moor, 45.  
Cro. Jac. 34.  
Dyer, 376. 292.  
Cro. Eliz. 114.  
Savil, 114.  
3. Com Dig. 332.  
2. Mod. 3.

THE SECOND QUESTION was, Whether the deed of 2. & 3. Philip & Mary be sufficient to convey those tithes, because they never were in the tenure of *Margaret Peto*? And it was strongly urged for the plaintiff, that those words in the indenture were a clause of restriction, and declares their intent that nothing should pass but that which was in the tenure of *Margaret Peto*.—But ALL THE JUSTICES held, that it was a good grant, and no restriction of the first words, because there are three distinct clauses before, viz. first, the grant of the seventy-eight acres of glebe; secondly, the grant of the tithes predial and personal; thirdly, the grant of the tithes of the seventy-eight acres of glebe land; which are all distinct several clauses by themselves. And this clause, "all which, &c." doth not depend upon any of them; and "which were, &c." is a restriction only when the clause is general, and is all but one and the same sentence, and not ended or certain before the end of the sentence, as in the Cases of 2. Edw. 4. pl. 29. *Plow.* 391. in *Wrothsfley v. Adams*, and *Plowd.* 395. in the *Earl of Leicester's Case*; but where the clause is not in one entire sentence, but distinct and disjoined from the other, as here it is, there cannot be any restriction. Also, this being in the case of a common person, addition of a false thing (viz. false possession) shall never hurt the grant; for the addition of a falsity shall never hurt where there is any manner of certainty before, as *Dodington's Case* (a), and *Bozon's Case* (b). But in the king's grants, where there is falsity in point of prejudice to the king's benefit, or a mis-information of the king's title, or upon a false suggestion of the party, there all grants shall be void, as it is 10. Co. 113. 21. Ed. 4. pl. 48. 8. Hen. 7. pl. 3. 9. Hen. 6. pl. 28. Wherefore they all concluded, that this grant of 2. & 3. Philip & Mary was good: and it is to be observed, that although these words, "which were in the tenure of J. S." when they are in one and the same sentence, may be construed to be a restriction, yet in these words, "all which were, &c." this word "all," so disjoined, cannot be a restriction, but an explanation: wherefore for these and other reasons it was adjudged to be a good grant against the plaintiff.

But in consideration and commiseration of the poor vicars, *Sir Edward Peto* was moved to add by way of a rent-charge to their means; and he agreed to the motion of the Court, and added four pounds *per annum* rent for their further sustentation, besides the rents paid to them.

(a) 2. Co. 32.

(b) 4. Co. 34. See also Dyer, 376.

Crisp against Pratt.

CASE 28

Hilary Term, 10. Car. 1. Roll 73.

**EJECTMENT** of sixteen acres of pasture in *Chipping-Barnet*. Although on a special verdict the jury find such facts as would well have warranted them to have inferred fraud, yet if they do not expressly find the fraud, the Court cannot presume it.

The case was, That *Ralph Brisco* senior, in 19. Jac. 1. purchased the lands in the declaration mentioned, being copyhold, parcel of the manor of *Chipping-Barnet*, to him and *Margaret* his wife, and to *Ralph Brisco* their son and his heirs. Two years after he became an innkeeper, and received all the profits of the land until 4. Aug. 4. Car. 1. at which time he became debtor by bond to *John Brisco* and others, and committed divers acts (mentioning the acts) which declared him to be a bankrupt. In 5. Car. 1. upon a petition to the lord-keeper, that the said *Ralph Brisco* senior was an innkeeper, and did get his living by buying and selling, and was indebted to divers persons, and become a bankrupt, the petitioners prayed to have a commission of bankrupt, which was granted them; and the commissioners adjudged him a bankrupt, and sold this land to the lessor of the plaintiff, for the benefit of the creditors, by indenture inrolled; which being shewn to the lord of the manor, he admitted him accordingly. Afterwards *Ralph Brisco* the father died, and the said *Margaret* died, and *Ralph Brisco* the son entered, and the lessor of the plaintiff entered upon him, and made a lease to the plaintiff for years; and the defendant, as servant of the said *Ralph Brisco* the son, ousted him. *Et si super totam, &c.* the Court shall adjudge for the plaintiff, they find for the plaintiff; if otherwise, for the defendant.

Upon this matter found, it was argued at the bar, and this Term at the bench; and *BERKLEY* argued for the plaintiff, and *BRAMPSTON*, *JONES*, and *MYSELF*, for the defendant.

1. Roll. Ab. 525.  
Jones, 437.  
March 34.  
3. Lev. 309.  
Skinner, 291.  
5. Co. 60.  
Hob. 72.  
10. Co. 56.

THE FIRST QUESTION was, the jury finding that the said *Ralph Brisco* senior did get his living by buying and selling, using the trade of an innholder, and not otherwise, Whether he be a person who is bankrupt, and within the statutes of 13. Eliz. c. 7. 1. Jac. 1. c. 15. and 21. Jac. 1. c. 19. (a)?—And *BERKLEY* held, that he was a bankrupt within those statutes; for an innholder is one who hath such use of buying and selling for the entertainment of his guests and their horses; and running in debt by this means, it is reason he should be accounted a person within the said statutes: and so much rather, because the jury find that he got his living by buying and selling, using the trade of an innholder.—But all THE OTHER THREE JUSTICES argued to the contrary in this point; for an innholder should not get his living by buying and selling; for although he buy provision to be spent in his house, he doth not properly sell it, but sells it at such rates as he thinks reasonable gains, and the guests should not take it at a certain price, but they may have it or refuse it if they will. And if an host take excessive prices, he is indictable (b). And innkeepers many times have hay and corn, and such things, of their own growing; and their gain is not only by uttering of their commodities, but for the attendance of their servants, and for the furniture of their house, rooms, and lodgings, for their guests: and

An innkeeper as such, is not a trader within the bankrupt statutes.  
3. Mod. 379.  
8. Mod. 47.  
12. Mod. 159.  
307.  
2. Bl. Com. 476.  
Carth. 150.  
2. Will. 169.  
3. Will. 146.  
4. Burr. 2067.  
Ld. Raym. 287.  
852.  
2. Peere Wms. 308.  
3. Peere Wms. 298.  
1. Bro. Ch. Ca. 174.  
1. Com. Dig. 504.  
1. Term Rep. 38.  
(b) Cook's Bank. Laws, 32.

(a) Vide 5. Geo. 2. c. 39.



CRISP  
against  
PRATT.

Copyhold estates are within the bankrupt statutes, and may be assigned by the commissioners.

Post. 368.

Jud. Ref. 112. 3  
Stone, 127.

1. Atk. 96.

1. Com. Dig.

516.

2. Com. Dig.

528.

See 5. Geo. 2. c. 30. Cooke's Bank. Laws, 354.

Copyhold lands given by a father to his son two years before the father became bankrupt, if done *bona fide* and without fraud, shall not be assigned by the commissioners—Fraud is a fact, and must be found by the jury.

Jud. Ref. 113. 4.

1. Com. Dig.

525.

1. Burr. 467.

477. 184.

2. Burr. 827.

Dougl. 282. 86

1. Bl. Rep. 441.

2. Bl. Rep. 996.

362.

2. Peere Wms

427.

3. Wils. 47.

Cowp. 124. 705.

5. Bac. Ab. 3. 2.

Dougl. 716.

(a) 1. Ld. Raym.

725.

Bull. N. P. 40.

1. Salk. 110.

Palm. 325.

10 Co. 57.

2. Mod. 44. 345.

12. Mod. 628.

Cowp. 434.

an innkeeper is no more such a person who gets his living by buying and selling than fermors, who buy for their provision: and the statutes mention only those who are merchants, and use to buy and sell in gross or by retail, and such who get their living by buying and selling, so as their principal means is by buying and selling.

SECONDLY, The question was, Whether a copyhold be within the said statutes to be sold by the commissioners? for although it be expressly named in the 13. Eliz. c. 7. in one clause, yet it is not in another; and in the 1. Jac. 1. c. 15. and 21. Jac. 1. c. 19. (upon which last statutes this case is grounded), copyholds are not mentioned, but generally all lands, tenements, and hereditaments.—But all THE FOUR JUSTICES agreed, that copyholds are within the intent and purview of all the said statutes; for being in the first statutes and the other statutes made in further confirmation and approbation thereof, they ought to be expounded liberally, and shall be construed accordingly, to make as strong provision as they may against the bankrupt.

THIRDLY, Forasmuch as it is found, that this land was given by the father (two years before he was an innholder, and six years before he became a debtor) unto his son, and no fraud found (although there be circumstances of fraud, by the taking of the profits only until the time he became a bankrupt), Whether it be in the power of the commissioners to sell it?—And BERKLEY held strongly, that it was in their power, because it is expressly within the words of 21. Jac. 1. c. 19. that they shall sell lands which he purchased in the name of his wife, children, or friends, named and intrusted by him, and this is so purchased.—But ALL THE OTHER JUSTICES were of the contrary opinion; for being purchased before he was a tradesman, and so long before he became a debtor, is not within the statute; for the statute intends such persons only who gained their livings by buying and selling, and by fraud had passed away their lands to friends, trust, and became indebted, and committed such acts of a bankrupt, that for such acts done by them after it should be within the commissioners power to sell such their lands. But here, many years before when he was a clear man, he procured this land to be settled upon his son (no fraud, or purpose of being a bankrupt, being found); would therefore be a mischievous case, and full of inconvenience if it should be within the statute; for none might know with whom to deal by way of marriage or otherwise when he is not a tradesman, and settles land upon his wife and children *bona fide*, and without cause of being suspected to be a bankrupt, and afterwards become a tradesman, and then a bankrupt, if this act should overthrow a conveyance duly settled. And for that purpose was cited 2. Co. 25. 10. Co. 56. *Chancellor of Oxford's Case*, that fraud ought not to be conceived unless it be expressly found; for *Fraus est odiosa et presumenda* (a). And in the tenth of king Charles 1. *Lady Gorge Case*, where *Earl Lincoln* purchased a manor in that lady's name being his daughter, and afterwards kept courts, and made leases in his own name, and always took the profits, and then sold it to *Sir Sydney Montague*, and *Lady Gorge* never questioned it in her life-time of her father; yet it was held in this court, unless it

be some fraud discovered, it is not within the statute of 27. Eliz. c. 4. although there be many badges of fraud: so here.—Wherefore it was adjudged for the defendant.

CRISP  
against  
PRATT.

Dennis against John Payn senior.

CASE 3.

Hilary Term, 14. Car. 1. Roll 680.

DEBT upon an obligation of eighty pounds. The defendant pleaded, that the plaintiff, in the court of Poole, being a court of record, had brought debt upon the same bond against John Payn junior, wherein John Payn senior and John Payn junior, were jointly and severally obliged with condition for the payment of forty pounds: that after a plea pleaded the plaintiff entered a retraxit, and the defendant averred that it was the same obligation, and that the said John Payn junior, named in the bond, and the said John Payn against whom the retraxit was, is one and the same person; and demands judgment, if against this retraxit he ought to sue, &c.: and upon this it was demurred.

WHITLOCK, for the defendant, argued, that this retraxit is in nature of a release, and quasi a release, as it is in Beecher's Case (a); and a release to the one obligor is a discharge to the other; and if one obligor be made executor to the obligee, it is a discharge for all the obligors. So if a feme obligee take one of the obligors to husband, it is a discharge to them all.

ROLLE, for the plaintiff, argued, that it is a bar only by way of estoppel betwixt that obligor and the obligee, whereof no other person shall take advantage; and it is not any release in fact, but only quasi a release, and that this plea is no bar for the other obligor.

I inclined to that opinion, that it is neither a release in fact nor in law, but quasi an agreement that he will no further prosecute; and it may be, the said John Payn junior paid the moiety of the said debt, and the obligee agreed to accept it of him, and that he would no further proceed against him, and being jointly and severally bound, he might make such an agreement, and not discharge the bond.

But BERKLEY held, that the plea was good, and was a good bar; for it is a bond joint and several; and one of them being discharged, it cannot now be a joint bond; therefore the discharge quoad the one is also a discharge quoad the other.—But being no other Justices in the court, it was adjourned.

(a) 8. Co. 58.

Evelin's Case.

CASE 4.

EVELIN being elected by the parishioners of St. Thomas to be churchwarden there with another, the parson, pretending that by the Canons (b) he was to make election of the other, named a person elected churchwarden by parishioners in London. Post. 589.—S.C. Jones, 439. S. C. 2. All. Ab. 234.

A mandamus lies to the spiritual court to administer the oath

(b) By the 89th Canon churchwardens then one by the parson and the other by the parishioners. Burn's E. L. title Churchwardens.

EVELIN'S  
CASE.

March. 22. 66.  
Ray. 439.  
Palm. 51.  
Lutw. 1010.  
Noy 31. 139.  
Cro. Jac. 532.  
1. Vent. 115.  
267.  
2. Vent. 41.  
Carth. 118.  
1. Lev. 73. 145.  
Stra. 145. 1246.

A custom that  
the parson shall  
chuse a church-  
warden shall be  
tried in the  
temporal court

one *Hill* to be churchwarden, and procured *Doctor Clark's* official to swear the said *Hill* and to refuse *Evelin*; whereupon the parishioners surmising, that they had a custom within the parish, time whereof, &c. to elect both the churchwardens, and that the Canons cannot take away their custom, prayed a writ to *Doctor Clark* to admit the churchwarden elected by them, and to swear him, and amove the churchwarden elected by the parson. And a precedent was shewn in the reign of *King James* where such a writ was granted, and it was said there were divers other like precedents. And because the churchwardens in *London* are, for the greatest part, corporations and owners of land devised to them, the writ was granted.

B. R. H. 130. 6. Mod. 89. 4. Com. Dig. 207. Cowp. 413.

And THE COURT (being informed that the said *Hill*, elected churchwarden by the parson, sued the said *Evelin*, elected by the parish, in the ecclesiastical court) granted a prohibition, to the intent it might be tried whether there were any such custom or no.

— 6. Mod. 89. 3. Salk. 88. 2. Ld. Ray. 1008. 1. Bac. Ab. 371. 3. Term Rep. 3.

## CASE 5.

## Wolnough's Case.

If parties be in  
custody for re-  
fusing to enter  
into a recogni-  
zance, and bring  
a *habeas corpora*,  
and the attorney  
general prays  
time to main-  
tain the return,  
the Court will  
admit the par-  
ties to bail.

Post. 557.  
S. C. Noy, 156.  
2. Hawk. P. C.  
173.

**W**OLNOUGH and seven others were committed by the mayor of *London* to *Newgate* for refusing to enter into recognizance to appear before the lords of the council; and upon a *habeas corpora* returned by the mayor and sheriffs it appeared, that by an order from the council-table they were appointed to come before the mayor and sheriffs to treat concerning foreign matters; and when they appeared, being required by the mayor, being in commission of *oyer and terminer* for the city, to perform the order of the lords of the council, and to enter into recognizance for a reasonable sum, they refused; whereupon he committed them.

PEARDE, MAYNARD, and KEELING junior, argued, that this return was not good: FIRST, Because it doth not mention the order, nor shew what the order was, so as THE COURT might adjudge thereof. SECONDLY, Because the recognizance is demanded for them to appear before the lords of the council, no time nor place appointed, nor cause shewn why it was demanded.

And because the king's counsel prayed time to maintain the return the parties were bailed until next Term.

## CASE 6.

## Arundel against Mare.

It is actionable  
to call a mer-  
chant "a cheat-  
ing knave."  
Ante, 507. 516.  
Post. 558 563.  
570.

1. Roll. Ab. 60.

**A**CTION FOR WORDS. Whereas the plaintiff was a merchant, &c. that the defendant said, "He was a cheating knave" and had cheated his father by returning twenty pounds for water &c."

It was moved in arrest of judgment by ROLLE, that an action lie not for calling one "cheating knave."

But forasmuch as he was a merchant, and it touched his profession BERKLEY and MYSELF (*ceteris absentibus* in the star-chamber) held that the action was maintainable: whereupon rule was given, that the plaintiff should have judgment.



Bagnall *against* Knight.

CASE 7.

Easter Term, 15. Car. 1. Roll 465.

**E**RROR of a judgment in the common pleas, in an action on the case in nature of a conspiracy. The plaintiff declared, that the defendant *falso et malitiosè*, caused such an indictment of perjury to be written containing *hanc falsam materiam*, &c. reciting it *verbatim*, and exhibited it to the grand jury before the justices of peace at *Westminster*, and procured it to be found; and that afterwards *Sir Edward Spencer*, one of the justices of the peace of *Middlesex*, before whom, &c. delivered it with his own hands to the justices of gaol-delivery and of oyer and terminer at the *Old Bailey* for the city of *London* and the county of *Middlesex*, whereby he was brought to the bar under the sheriff's custody, arraigned, and acquitted (a). Judgment being given in the common pleas for the plaintiff, the defendant brings a writ of error.

WORLICH and FARRER moved, that the declaration was not good: FIRST, Because it is by way of recital of the indictment only; and they relied upon the Case of *Browning v. Beeston* (b).—*Sed non allocatur*; for it is *scribi fecit talem falsam materiam*, which is a direct affirmative.

SECONDLY, Because he doth not shew that he was in the gaol, and then the Justices of the gaol-delivery have no power to meddle with him.—*Sed non allocatur*; for *ductus ad barram et sub custodia* shews him to be in the gaol.

(a) 9. Co. 56. 12. Co. 23. F. N. B. Cro. Car. 286. 315. 419. Stra. 114. 115. 1. Sid. 15. Cro. Jac. 131. 230. (b) Plowd. 136.

An action for malicious prosecution must shew that it was within the proper jurisdiction, and that the indictment was good;—but *ductus ad barram* implies he was in gaol.

2. Bulst. 271. Cro. Jac. 357. Cro. Eliz. 564. 724. 1. Sid. 15. 1. Roll. Ab. 111. Yelv. 46. 116. 1. Com. Dig. 160. Stra. 691. Dougl. 215.

Daltby *against* Dorthall and his Wife.

CASE 8.

Michaehmas Term, 14. Car. 1. Roll 415.

**E**RROR of a judgment in an action on the case in nature of a conspiracy, For causing them to be indicted of felony falsely and maliciously, and to be detained in prison *quousque* they were acquitted, *ad damnum ipsorum*, &c. Upon not guilty pleaded, a verdict was found for the plaintiffs; and judgment being given for them,

The error assigned was, Because it was *ad damnum ipsorum*, whereas a wife cannot join with her husband for damages, for it is a several damage to either of them.

BERKLEY, Justice, upon the first motion, was of that opinion; for it is a several wrong to either of them, and the wife may not join for a tort done to her husband.

But I held the contrary, because it is grounded upon one entire record, by which they were both prejudiced, and they may join if they will; or the husband only may have the action for it, that he was damnedified.—Whereupon it was adjourned, *ceteris absentibus*.

1. Com. Dig. 575. 3. Tetr. Rep. 627.

Husband and wife may join in an action of conspiracy for malicious prosecution against them both; or the husband may have it alone; for though it is for a tort, yet it is grounded on one entire record.

Ante, 175.

Jones. 440. Cro. Jac. 355. 473.

Child *against* Greenhill.

CASE 9.

Trinity Term, 14. Car. 1. Roll 664.

**T**RESPASS for entering and breaking his close and fishing in *separati piscaria sua*, and for taking *pisces suas ibid. viz.* 100 eels, &c. After verdict, upon not guilty pleaded, and found for the plaintiff, and damages entire given,

trespass will lie for taking them.

EXCEPTION

The owner of a several fishery hath a privileged property in the fish therein, and Ante, 388.

CHILD  
against  
GREENHILL.

Co. Lit. 122.  
127. b. in notis.  
7. Co. 17.  
Cro. Eliz. 195.  
F. N. B. 89.  
3 Lev. 227.  
March, 48.  
3 Mod. 325,  
376.  
6 Mod. 183.  
12 Mod. 144.  
Salk. 536. 637.  
Carth. 286.  
Ld Ray. 250.  
5 Com. Dig.  
352.  
Doug. 56.

EXCEPTION was taken in arrest of judgment by MAYNARD and ST. JOHN, That the declaration was not good to say *pisces suas*, for he hath not any property in the fish, until he takes them, and hath them in his possession.

But ROLLE and GRIMSTON, for the plaintiff, said, that being they were in *separali piscariâ suâ*, it may well be said *pisces suas*, for there is not any other may take them (a).

And of that opinion was ALL THE COURT, who severally delivered their reasons; for, for deer in a park, or conies in a warren, the owner hath a special property in them, as long as they are in the warren or park; so of doves in a dovecote. But for deer or conies, if they be not in a park or warren, he may not say *suas*, unless he add that they were domestic. Wherefore being taken out of his several piscary, and not *extra liberam piscariam suam*, the action is maintainable; and it was adjudged for the plaintiff. *Vide* 43. *Edw.* 3. pl. 24. 3. *Hen.* 6. pl. 55. 22. *Hen.* 6. pl. 59.

(a) See Mr. Hargrave's note (7) to page 122. a. Co. Lit. 126. b.

# CASE 10.

## Sprigg against Rawlinson.

Michaelmas Term, 14. Car. 1. Roll 153.

Ejectment,  
while proceed-  
ings were in  
*Latin*, would  
not lie "*de re-  
positorio*," except  
its meaning was  
ascertained by  
ANGLICE,  
"*warehause*."  
Ante, 188. 512.

S. C. 1. Jones,  
524.  
Co Lit. 223. b  
10 Co. 133 a.  
March. 96.  
Ld. Ray 1470.  
Stra 54. 71.  
695. 884.  
5. Com. Dig.  
274.  
Doug. 305.  
2. Term Rep.  
31.

ERROR of a judgment in the common pleas, in an ejectment of a lease of a messuage "*et annuum REPOSITORYUM in parochiâ Omnium Sanctorum; habendum tenementa, &c.*" from the Feast of The Purification, for five years; and that the defendant entered and ejected him from the lands aforesaid. After verdict upon not guilty pleaded, and found for the plaintiff, and judgment for him,

ERROR was brought, and assigned, That "*repositorium*" is a personal thing called a "*cupboard*," which is removeable, and whereof an ejectment lies not.

Whereupon it was demurred, and very well argued by PHESANT for the defendant in the writ of error, and by GRIMSTON for the plaintiff.

PHESANT urged, that "*repositorium*" is not only "*a cupboard*," but also "*a warehause*," and so is expressly mentioned to be in the Dictionary; and when *repositorium* may be intended *a warehause*, and a real thing which may be demised, it shall be taken rather that way, than to construe it to be a cupboard, which cannot be demised.

And it was now argued by all the Justices. BERKLEY and MYSELF held, that the declaration is good, and not erroneous; for if it had been with an ANGLICE, *a warehause*, it had been clearly good, as all the Justices agreed; and now that it is put without an *Anglice*, being a good *Latin* word for *a warehause*, and so expressed in print, the Court may well take conuſance thereof as of a real thing demisable; and when also it is mentioned with a tenement, and an entry and ejectment made thereof, it must be intended to be a warehause: and when the lease, upon which the action was brought, was shewn to the cursitors in chancery who made the writ, it being a warehause in the indenture, they translated it *repositorium*, and well, because they had

had the Dictionary to warrant it: and an ejectment lies thereof as well as of a chamber, as 5. Hen. 7. pl. 9.; or an assise de cellariâ, as 24. Edw. 3. pl. 33.; or of a shop, as 48. Edw. 3. pl. 4. and 14. Assise, 11. And although in *Savell's Case* (a) it is held, that an ejectment lies not of a close, yet it was said, that the contrary had been since adjudged in *Wykes v. Sparrow* (b). And BERKLEY said, that an assise de alneto, bullariâ, salinâ, and such like, although they be uncertain in the declaration, yet because they may be made certain, is good enough: so here it is certain enough what the plaintiff shall recover, and of what the sheriff shall put him in possession (c); wherefore we concluded, that judgment should be affirmed.

But JONES and BRAMPSTON, Justices, said, they conceived the declaration to be ill, because *repositorium* for "a warehouse" is not used nor known in the law; and they never heard or read of that word for a warehouse: and in *Calepine* it is said to be "a voyder;" and of such words which be not usual the law shall not take any consuance, as they do of *cottagium*, *curtelagium*, *fadina*, and the like, which are words known at the common law. Wherefore they would advise.—Afterwards in *Hil. 15. Car. 1.* because the Court were still divided in their opinions, the defendant in the writ of error, for his expedition, commenced a new action, and consented that this judgment should be reversed.

SPRIGO  
against  
RAWLINSON.

Noy, 109.

Styles, 215.  
Cro. Eliz. 218.  
2 Bul. 114.  
Palmer, 337.  
Strange, 1063.  
1084.  
Andr. 106.

(a) 11. Co. 55. (c) 1. Burr. 629. 5 Burr. 2673.  
(b) Trinity, 15. Jac. 1. Roll. 774. 2. Bac. Abr. 169. Stra. 695.  
Cro. Jac. 436.

# Young against Fowler.

CASE II.

Hilary Term, 14. Car. 1. Roll 1264.

**ACTION UPON THE CASE** for disturbing him to execute his office of the REGISTER OF THE DIOCESE of *Rocheſter*. Upon not guilty pleaded, a special verdict was found, That from time whereof memory, &c. the *Bishop of Rocheſter*, for the time being, hath used to grant the office of the Register for all causes within the diocese of *Rocheſter*, as well in possession as in reversion, for life, *habendum et exercendum* by such a person to whom such a grant is made, when the office comes into possession, *per se vel ſufficientem deputatum*, *habendum* for the life of such a person to whom such a grant should be made. And they find the statute of 1. Eliz. c. 12. and that *Thomas Wardgar* was officer for his life, 20th June 1510, and was in possession for his life by a former grant: and he being so in possession, *John Young*, bishop of *Rocheſter*, eodem 20th June 1590, by his deed granted the said office to *John Young* the plaintiff, *habendum et evercendum per se vel ſufficientem deputatum ſuum* for his life, when it should be void by the death or surrender of the said *Thomas Wardgar*, which was confirmed by the dean and chapter by their deed 23d June 1590. And they find, that the said *John Young* at the time of the grant was an infant of the age of eleven years and six weeks, and not above; but that he attained the full age of one-and-twenty years in the lives of the bishop and of the said tenant for life: and that the bishop died in 5. Jac. 1. and that

A grant by the bishop of the office of register of a diocese, in reversion after the death of the tenant for life, to an infant of eleven years of age, *exercendum per se vel deputatum ſufficientem*, is good, notwithstanding the infancy; but if he make an insufficient deputy, it is a forfeiture of the office.

Ante, 280.  
March. 4. 38.  
1. Roll Ab 731.  
2 Roll Ab. 153  
9. Co. 97.  
Dyer, 150.  
Hob. 143.  
Cro. Eliz. 636  
4. Mod. 279.

Co. Lit. 3. 2. Inst. 382. 4. Com. Dig. 285. Cases Tempus Ta'bot, 106.



YOUNG  
against  
FOWLER.

*Wardgar* died in 15. Jac. 1.; and that the defendant disturbed him to exercise the said office: *Et si super totam materiam* the Court shall adjudge for the plaintiff, they find for the plaintiff, and assess damages to eighty pounds and costs; and if, &c.

This Case was argued at the bar by MAYNARD, for the plaintiff, and by WARD, for the defendant.

THE FIRST QUESTION was, Whether this grant of this said office to an infant of the age of eleven years, *exercendum per se vel deputatum suum* in reversion, after the death of a tenant for life, be good, or nor?

SECONDLY, Whether an office for life, usually granted in possession or reversion, being granted by the bishop in reversion, and confirmed by the dean and chapter, be good to bind his successors?

As to the first, ALL THE JUSTICES held, that this grant of the office in reversion, after the death of tenant for life, to an infant of the age of eleven years *exercendum per se vel deputatum sufficientem* (as the usual grants are) is good, notwithstanding the infancy; and notwithstanding the opinion cited in *Co. Lit. 3.* and there said to be resolved 40. & 41. *Eliz. Scambler v. Walter*, that the grant of the office of an under-stewardship in possession or reversion to an infant is void, because he is incapable thereof, not having knowledge to execute *pro commodo regis et populi* (a). But this case was denied, unless it be with this difference, where it is granted with such a clause to exercise it *per se vel deputatum*; and where he is of such a tender age that he cannot by intendment execute it by himself, as being an infant of three or four years of age, who hath not discretion to execute it: but when there is a clause to execute it *per se vel deputatum suum sufficientem*, it is good enough: for he may appoint a sufficient deputy; and if he doth not elect such, it is a forfeiture of his office: and a deputy is allowed, especially in ministerial offices, and to be approved by the Judges of that court; and as an infant may present to a church, because the ordinary gives the allowance whether the clerk be sufficient, so the lord of the manor or the Judge of the court is to give approbation of the deputy's sufficiency; and if the deputy misdeemean himself in his office, or be unskilful, it is a forfeiture: and at the infant's peril: and as an infant may have an office by descent, as to be sheriff, or warden of the Fleet, and the like, which are offices of charge and of trust, so he may have an office by grant: nor was the plaintiff here merely incapable of this office, especially it being granted in reversion after the death of the tenant for life; which fell not unto him until he had attained his full age, and was sufficiently able to execute it. Also if it had fallen unto him at the time of the grant, he was then of such age as by intendment he might have written the acts and orders, &c. or made election of a sufficient deputy. Therefore they all concluded, that the grant was good notwithstanding this exception. *Vide 5. Edw. 4. 3. & 48. Dyer, 150. 39. Hen. 6. pl. 32. 11. Edw. 4. pl. 1. 1. Hen. 7. 28. 9. Edw. 4. pl. 5. & 26.* where an office may be entailed and granted in fee, 21. *Edw. 4. pl. 13.* An infant may be a mayor; and the acts by the mayor and commonalty shall not be avoided by the nonage of the

1. Inst. 59.  
Ld. Raym 658  
1. Leon. 288.

(a) R. 598.  
Ante, 279.  
Cro. Jac. 18.  
Cro. Eliz. 637.  
1. Roll. 731.  
Co. Cop. 125.  
Cowp. 222.

Gro. Eliz. 637.  
Ante, 279.  
Moor, 845.  
3. Bac. Ab. 736.

Co. Lit. 233. b.

Hob 142.  
Co. Lit. 3. b.  
Mr. Hargrave's  
note (4).

Co. Lit. 43. a

the mayor. *Co. Lit.* 107. 18. *Edw.* 3. pl. 3. 12. *Co.* 8. 27. *Hen.* 6. "Grants," 12. "Infant Presents," *Co. Lit.* 234. concerning Offices, 10. *Hen.* 4. pl. 14. Contracts bind an infant.

YOUNG  
against  
FOWLER.

THE SECOND POINT was, Whether the grant of an office for life in reversion, being usually so granted by the bishop, with confirmation of the dean and chapter, be good against the successor, or void by the 1. *Eliz.* c. 4. § 34. WARD objected, That it was void, because it is not necessary, when there is an officer in possession, to make another officer: and when it is not necessary to be granted, it is void against the successor by the said statute; as it is held in the case of the *Bishop of Sarum*, 10. *Co.* 60, 61.—But THE JUSTICES resolved to the contrary: for being found to be an office usually granted in possession for life, or in reversion for life, then every bishop for his time may grant the office, because it is a necessary office, and ought always to be full; so as when one dies there may be another officer immediately to execute the said office, for the benefit of the king's subjects: and when it hath been usually granted for life in reversion, as here it is found it hath, there is not any prejudice to the successor, for he takes not any matter of profit from him, and he hath an officer who is necessary; and the case cited of the *Bishop of Sarum* well warrants it: and in the case of the *Bishop of Chichester v. Freedland* (a), it was held, that the grant of an ancient office by the bishop, without increasing of a new fee (it being confirmed by the dean and chapter), was good against the successor. But the doubt there was, Whether the addition of a new fee made all the grant, or only the additional fee, to be void? Wherefore they all resolved in this case, that this grant in reversion, as it is confirmed, is good, and adjudged it for the plaintiff. 9. *Co.* 97. *Sir George Reynolds's Case*, 5. *Co.* 2. § 3.

The office of register of a diocese, or any other office usually granted for life in possession or reversion, may be granted in reversion by every bishop; and if confirmed by the dean and chapter, will bind his successors. Ante, 259. Dyer, 150. 2. And. 118. Hob. 43. 4. Mod. 30. 1. Burr. 219. 224. Dougl. 573.

(a) Ante, 47.

### Seeles and Others, Prisoners.

CASE 12.

UPON a *habeas corpus* directed to the Keepers of THE PORTER'S LODGE, being the prison for the Council of the marches of Wales, it being returned, that they were committed to him by virtue of a decree of the said council, upon information against them, that the one of them inveigled the son and heir of J. S. being of the age of seventeen years, in the night and when he was drunken, to marry the sister of another of the defendants: whereupon they were every of them severally fined to the king, some of them to an hundred marks, some to forty pounds, and an hundred marks damages to the father, who was the prosecutor, and committed to prison for a year, and until the said fines paid, and the said hundred marks damages satisfied to the said J. S. and until they entered a recognizance for their good behaviour, and until the said Court took further order.

A criminal information will lie for inveigling an infant from his father's house, and inducing him to marry, &c. March. 32. 5. Mod. 221. Comb. 456. 2. Keb. 432. 3. Keb. 101. 1. Lev. 257. 1. Sid. 387. Carth. 384. 5. Mod. 121. 1. Burr. 606.

Skin. 81. Raym. 259. 3. Com. Dig. 426.

IT WAS ALSO returned, that they were committed by virtue of an order from the lords of the council.—And this return WAS HELD utterly insufficient for the last part, because it was not mentioned what was the order of council.

Commitment for refusing to obey an order must state what the order was.

It

A commitment to "remain till further order" is bad. It was also moved by GRIMSTON, That the return was ill, to award to prison, to remain there until further order taken; which is utterly uncertain.

Post. 579.—1. Lev. 230. 2. Hawk. P. C. 186.

*Qu.* If the courts in *Wales* have cognizance of clandestine marriage? It was likewise doubted, Whether the court of marches might meddle with a *clandestine marriage* to punish it, being a mere spiritual act?

No damages can be given on an indictment. As also about the sentence for damages to the party, although it be within the express words of the instructions, &c.

*Ante*, 318. 531. Whereupon day was given until *Octabis Michaelis*; and in the interim the parties were bailed.

552. 595.  
2. Hawk. P. C. 300.

Michaelmas



# Michaelmas Term,

559

15. Car. 1. In the King's Bench.

Sir John Brampston, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

*Facy against Lange.*

CASE 1.

*Trinity Term, 7. Car. 1. Roll 1549.*

**A**T TACHMENT upon a prohibition. The plaintiff declares, In an attachment upon a prohibition, the party shall recover damages and costs against the party for proceeding after the prohibition awarded.

The first issue was, That he did not sue after the prohibition delivered:

The second upon prescription: and both found for the plaintiff; and damages and costs given by the jury.

MAYNARD now moved, that neither damages nor costs ought to be awarded; but the party is only finable to the king for the contempt of prosecuting his suit, &c.

But upon a judgment in the common pleas upon advisement and search of ancient precedents, where the suit being continued in the spiritual court after a prohibition delivered, an attachment issued upon the prohibition; and because thereby the party was damnified, and out to his suit of attachment, which was found to be sued, the party were recovered damages and costs.

THE COURT therefore here unanimously agreed, that the party shall have his damages and costs found by the jury; and rule was given for judgment to be entered accordingly, unless cause, &c.

See 8. & 9. Will. 3. c. 11.

*Barfoot against Norton.*

CASE 2.

*Trinity Term, 15. Car. 1. Roll 1227.*

**P**ROHIBITION for suing for divers kinds of tithes, *et inter alia* The honey and wax of bees in the hive are tithable. for HONEY, surmising it was not payable *quia volatilia*; and it was thereupon demurred.

GRIMSTON now moved, that by law tithes are to be paid for honey; as appears in *F. N. B. 31. g. and Linwood, fol.*

ALL THE COURT was of that opinion; and consultation was awarded, unless cause, &c.

Moor, 599. See vide 1. Roll. 651. pl. 5. 3. Com. Dig. 99.

*North against Wingate.*

CASE 3.

*Trinity Term, 15. Car. 1. Roll 973.*

**E**RROR of a judgment in the common pleas in debt upon the 1. & 2. *Phil. & Mary*, c. 12. for taking tenpence for a distress, where by the statute he ought to take but fourpence, unless in places where

have damages and costs; and the judgment shall be in *misericordia*. Jones, 447. March. 56. 61. Ab. 516. 574. Cro. Jac. 70. Noy, 62. Carth. 230. Salk. 206. Bull. N. P. 333, where

NORTH  
against  
WINGATE.

3. Lev. 374.  
1. Vent. 133.  
Skin. 363.  
1. Ld. Ray. 172.  
2. Com. Dig.  
542. 558.  
2. Hawk. P. C.  
378, 379.  
3. Burr. 1723.  
4. Burr. 2490.  
Term Rep. C. B.  
11.

where it is otherwise accustomed, *sub pœnâ forisfacturæ* five pounds. The defendant pleaded *non debet*; and the jury found, *quod debet* the said five pounds, and assessed damages twopence, and costs 53s. 4d.: and the court increased the costs to seven pounds; and judgment given, that he should have writ for the said five pounds, and the said damages and costs, and that the defendant be *in misericordiâ*. And of this judgment error was brought and assigned by

GRIMSTON, FIRST, That no damages or costs ought to be given, because it is a penal statute; and a penalty being given by the statute, he ought not to have any costs and damages but the penalty only: and for proof thereof he cited *Pilford's Case*, 10. Co. 115. that where a statute gives single, or double, or treble damages, and doth not mention any costs, there the plaintiff shall not recover any costs (a).

THE SECOND ERROR assigned, Because the judgment is *ideo in misericordiâ*, where it ought to have been *ideo capiatur*.

But ALL THE COURT resolved, that the judgment was good, and ought to be affirmed: for to THE FIRST, when a statute gives a penalty certain, and gives an action of debt, there if the defendant doth not pay it upon demand, but enforceth the party into a suit, and he recovers by action of debt, *ex consequenti* he shall recover his damages, because he did not pay the duty due by the statute upon demand; and he shall also recover costs, for otherwise he should be at a loss to expend more than he recovers, which the statute never intended. But where the duty is uncertain, as to recover treble damages, as upon the statute of waste, or upon the 2. *Edu.* 6. c. 1. for not setting forth of tithes, there the duty being uncertain, the statute intends to give the treble value only, and not the costs; and so are the precedents in *Coke's Entries*, 163. & 164. And as to the second error, the judgment being in debt for non-payment and not upon the statute, the judgment ought to be *in misericordiâ*.

(a) See 8. & 9. Will. 3. c. 11.

#### CASE 4.

Lee against Russell.

Trinity Term, 15. Car. 1. Roll 691.

IN DEBT ON  
bond to accept  
a lease on re-  
quest, if to a  
PLEA of "non  
"requisivit" the  
plaintiff replies  
tender of a lease,  
without saying of  
what lands, and  
issue on the re-  
quest, this aids  
the defect in the  
replication.

- Plowd. 230.  
Cro. Eliz. 825.  
Kitch. 238.  
3. Co. 52.

ERROR of a judgment in the common pleas in debt upon an obligation, conditioned that if the obligor accepted a lease by indenture of such lands upon the plaintiff's request, and sealed a counterpart thereof, that then the obligation shall be void.

The defendant pleads, that the plaintiff did not request him to accept a lease.

The plaintiff replies, that he caused an indenture to be drawn of a lease, according to the said condition, and to be ingrossed, and a label to be affixed thereto, *cum serâ appensâ*, and required and offered to deliver it to the defendant to accept thereof, and he refused.

The issue was upon the request; and found for the plaintiff, and judgment given.

And now error brought and assigned by ROLLE, and by God BOLT, Serjeant, *ore tenus*.

FIRST

FIRST, That it was *cum serâ labello annexâ*; and *sera* is no Latin word for wax, but signifies a lock—*Sed non allocatur*; for it may be well intended for wax *secundum subjectam materiam*.

SECONDLY, Because he doth not aver that the lands mentioned in the indenture are the same lands in the condition.—But because he had pleaded *quod non requisivit*; and he replied, that it was *secundum formam conditionis*; therefore if they were other lands, it ought to have been shewn on the part of the defendant, otherwise they shall be intended to be the same lands; the judgment was affirmed.

Ante, 288.—Cro. Jac. 139.

## Anonymous.

## CASE 5.

A WRIT OF ERROR was brought by the bail of a judgment given against the principal in the court of the city of Westminster. The writ was, "*quod tam in redditione iudicii, quam in redditione executionis, erratum fuit.*"

The error assigned was, Because a *capias* was awarded against the bail, and he taken in execution without any *scire facias* sued against him; which was a manifest error.

But an exception was to the writ of error, Because the bail cannot have a writ of error of the principal judgment;—which was agreed by THE COURT.

But then the question was, the record being removed, Whether he may have a writ of error, *quod coram vobis residet*?—And thereof THE COURT doubted, and would advise.

1. Roll. 754. Yelv. 6. 2. Leon. 201. 1. Com. Dig. 498. 5. Com. Dig. 291.

## Lauder against Brooks and Others.

## CASE 6.

EJECTMENT of lands in Kent, whereof William Brooks being seised in fee, holden in soccage, and of other lands holden in capite, by his will in writing devised the said soccage lands to Brooks his base son, and the heirs of his body. The defendant pretended there is a custom in Kent to devise lands in gavelkind holden in soccage. The sole question was, Whether there were such a custom, or no? for if not, the plaintiff hath good title: and if such lands were devisable by custom before the 32. Hen. 8. c. 29. then the defendant hath good title.

The defendant, to prove the custom, shewed the lands in gavelkind are devisable by custom (a); and that lands in gavelkind may be given or sold without the lord's licence (b).

WHITEFIELD, Serjeant, said, he interpreted the word "given" to be by will, and the word "sold" to be by deed; and produced for evidence divers wills out of the Registers Offices in Canterbury and Rochester, of devises of lands by testament, in the times of the kings Hen. 6. Edw. 4. and Hen. 7. of several lands in several villages in Kent: and shews two verdicts, the one in 9. Jac. 1. where, in a trial at this bar, the title was found for the defendant, that it was a good custom there; and the other verdict, 13. Car. 1. at the common pleas bar, where title was found for the now defendant, that the lands were devisable by custom: and there was a Book of Reports

(a) Fitz. Nat. Brev. 198.

(b) Lambert, fol.

shewn,



LAUNDER  
against  
BROOKS and  
OTHERS.

Courts of law  
take notice only  
of the general  
and not of the  
special customs  
of GAVELKIND.  
Ante, 445.

Co. Lit. 110.

175. b.

1. Lev. 79.

1. Sid. 137.

2. Sid. 154.

Ray. 76.

Robinson on

Gavelkind, 42.

2. Bac. Ab. 644.

shewn, where in *Michaelmas Term* 41. & 42. *Eliz.* all the court of common pleas agreed, that such a custom was there; but they said, this custom ought to be pleaded, and that the land so devised was holden in soccage: for although the Court shall take cognizance of the custom of gavelkind in *Kent* without pleading, yet of this special custom to devise, &c. or that the lands are holden in soccage, or that the wife shall have the moiety for her dower, they ought not to take cognizance without special pleading, they being particular customs; but for the custom of gavelkind it sufficeth to shew, that it is in *Kent*, and of the nature of gavelkind, without pleading the custom; for the Court takes knowledge what the custom of gavelkind is.

But HEATH, *the King's Serjeant*, PORTER, TWISDEN, and DENN, did much endeavour to disprove the said evidence, and to shew, there was no such custom to devise gavelkind lands holden in soccage; and for proof thereof relied upon the YEAR-BOOK of *Edw. 2.* "*Mortd'auncestor*," 39. that an assise of mortd'auncestor lies not of lands devisable.

But ALL THE COURT resolved to the contrary, that an assise of mortd'auncestor lies of lands devisable, if it be true that his ancestor died seised, unless it appears that the defendant claims by some other title; but if the defendant plead, that the land is by custom devisable, and was devised unto him, it is a good bar of the action.

SECONDLY, It was objected, That many wills were made of gavelkind lands, where generally the lands were in use, and in the hands of feoffees; and many precedents were of this kind.

THE COURT answered thereto, that the precedents shewn were devises of lands, without mentioning them to be in the hands of feoffees; and they conceived they might devise by the custom: and a precedent was produced out of *Mr. Lambard*, of a testament of lands in gavelkind before the Conquest, &c.

But HEATH answered, it was an ill precedent, because the husband and wife devised; and it cannot stand with the law, that the wife should join with the husband.

And JONES, *Juslice*, said, that in *North-Wales* there is much land of this nature by custom, devisable by writing or without writing.

And they for the plaintiff shewed, that in the common pleas, after the trial was had in this court, there was another trial in the common pleas, 11. *Car. 1.* by the knights, esquires, and gentlemen, who found for the now plaintiff, that there was not any such custom.

But it was thereto answered, in behalf of the defendant, that LORD FINCH shewed his dislike of that verdict. And afterwards, 13. *Car. 1.* upon full evidence, a verdict was given for the defendant's title, that there was such a custom, and that the land was devisable by custom there.

AND AFTERWARD, the jury here going from the bar to consider of this matter *sedente Curia*, the plaintiff was nonsuited.

1. Sid. 135.

## Roe and Bond against Devys.

CASE 7.

Trinity Term, 13. Car. 1. Roll

**TRESPASS.** The parties being at issue upon the *venire facias*, one Samuel Sutton was returned, and in the *disfringas* he was likewise named Samuel Sutton; but upon the panel annexed by the sheriff, he was named Daniel Sutton, of the same place, and returned and sworn.

This was assigned to stay judgment; but the sheriff being examined said, it was a misprision in his clerk, who writ Daniel for Samuel; and the clerk being examined, affirmed as much, and that Samuel Sutton was sworn and gave the verdict: and the juror Samuel being examined, affirmed he was the same person who was sworn, and that his name was Samuel, and was of the same vill, and that there was not any known by the name of Daniel Sutton within the said vill.

Wherefore by order of Court it was appointed to be amended, and made Samuel in the panel; for they held, that it was amendable as well by the 8. Hen. 6. c. 12. as by the common law, it being an apparent misprision of the clerk. But the 21. Jac. 1. c. 13. doth not extend thereto, but only to surnames mistaken, &c. which are to be amended, if by examination it may appear they be the same persons who were returned. And the judgment was affirmed.

A mistaken Christian name in the panel is not amendable by 21. Jac. 1. c. 12.; but it may be amended by 8. Hen. 6. c. 12. and by common law.

Jones, 448.  
1. Roll. Ab. 197.  
Cro. Eliz. 400.  
466.  
Cro. Jac. 116.  
396. 457.  
Cro. Car. 203.  
Hob. 28.  
5. Co. 43. a.  
Strange, 1214.  
1. Com. Dig. 321.  
Douglass, 114, 115.

## Reignald's Case.

CASE 8.

**ACTION FOR WORDS.** Whereas he was deputy-clerk to one Parker for divers years, who was register under such an archdeacon, and received divers fees and profits of that office to render accompt; that the defendant having communication of him and of his office, and intending to deprive him of all his benefit thereof, and to cause him to incur the displeasure of his master, the said Parker, and of the said archdeacon, who reposed much trust in him, said of the plaintiff, "He is a base cozening knave; he is a cheater, and hath cozened his master" (the said Parker innuendo).

The defendant pleaded not guilty: and it was found against him, and damages 30l.

CHARLES JONES now moved in arrest of judgment, that these words are not actionable; for he doth not say that he cozened him concerning his office; and it may be intended, he cozened him in some other matter besides his office, and then the action lies not.

But ALL THE COURT (*absente BRAMPSTON*) held, that the action well lay; for it shall not be intended but that the words were spoken concerning the execution of the office, where the communication was concerning the office. Wherefore it was adjudged for the plaintiff.

To accuse a servant who is employed in an office of trust, of having "cozened his master," is actionable; for it shall be intended in his office.  
Ante, 480. 552.  
Hob. 76.  
Cro. Jac. 504.  
1. Com. Dig. 179.  
2. Term Rep. 110.

## CASE 9.

## Proctor against Chamberlaine and Two Others.

In debt against three executors, if one of them on summons confess the action, and judgment be *de bonis testatoris* against all, but *si non de bonis propriis*

against him who appeared, the others cannot be taken in execution on a *scire facias*, although a *devastavit* be found and two *nibils* returned. Ante, 519. 527. Post. 603.

5. Co. 32. a.  
8. Co. 61. b.  
Co. Lit. 126. b.  
Cro. Jac. 64.  
1. Salk. 310.  
1. Com. Dig. 256.

**E**RROR was brought of a judgment in the common pleas in debt, against them as executors of one *Chamberlaine*. The one of the three executors appeared upon the summons, and confessed the action; and judgment given, *quod recuperaret debitum* against the three executors; and that he shall have execution against the three executors *de bonis testatoris* in their hands, *si tantum*, &c. and the damages *de bonis testatoris* of him who appeared, and *misericordia* against all.

And hereupon a *scire facias* issued into *London*, where the action was laid, *et si constare poterit per inquisitionem*, that they have wasted the goods, *quod tunc scire faciat* to them to answer the debt.

Upon a *devastavit* found by the inquisition and returned, a *scire facias* was taken forth, and on two *nibils* returned, judgment was given and execution issued against them, and *Proctor* was taken in execution; and upon this judgment the writ of error was brought.

The FIRST ERROR assigned was, Because the appearance was upon the summons, and not upon the grand distress, and therefore out of the statute of 9. *Edw. 3. c. 3.*

SECONDLY, Because it is "*misericordia*" against the three, where two of them never appeared, and against him who appeared no *misericordia* ought to be, because he came in upon the day of summons.

IT WAS RESOLVED, for these and other reasons, that the party taken in execution should be discharged.

## CASE 10.

## Terrey's Case.

In an indictment on a public statute, a variance in that which is inserted by words of inducement only is not fatal.

A person convicted on 33. *Hen. 8. c. 1.* may be fined and pilloried.

(a) 3 Inst. 133.  
1 Hawk. P. C. 344.

**T**ERREY, a merchant, was indicted upon the 33. *Hen. 8. c. 1.* of false tokens, because that he by a false note, in the name of *John Dubois*, obtained into his hands a wedge of silver of the value of two hundred pounds; and found guilty.

CHARLES JONES and HOLBORN took exception against the said indictment for variance therein in several words from the statute.

But because there was not any recital, nor misrecital of the statute, but it was only an inducement to the setting down thereof, and not in any point material, THE COURT resolved it to be good enough.

And thereupon it was adjudged, that he should stand upon the pillory in *Cheapside*, and upon the pillory in *Cornhill*, near to the Exchange, upon the Saturday following, and should pay fine to the king of five hundred pounds (a), and be imprisoned during the king's pleasure, and be bound with good sureties for his good behaviour.

See 30. *Geo. 2. c. 24.*



# Hilary Term,

15. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*

Sir William Jones, *Knt.*

Sir George Croke, *Knt.*

Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

} *Justices.*

## Memorandum.

CASE 1.

IN this Vacation SIR GEORGE VERNON, *Knight*, of the county of *Chester*, first made Baron of the exchequer, and afterwards one of the Justices of the common pleas, a man of great reading in the statutes and common law, and of extraordinary memory, died at *Serjeants-Inn*, in *Chancery-lane*, on the 16th *December* 1639; and upon the 18th *December* following was buried in the *Temple church*, *London*.

Serjeant Foster  
succeeds Mr.  
Justice Vernon.

And ROBERT FOSTER, *Serjeant*, being of the *Inner-Temple*, was sworn Justice in his place on the 3d *January* 1639.

Upon the 14th of *January* 1639, THOMAS LORD COVENTRY, Lord Keeper of the Great Seal, died about four o'clock in the morning. He was a pious, prudent, and learned man, and strict in his practice, being Lord Keeper for fourteen years and upward: he died in great honour, and much lamented by all the people.

Lord Keeper  
Coventry dies,

And afterwards, upon the 18th *January* 1639, SIR JOHN FINCH, Chief Justice of the common pleas, and chancellor to the queen, was made Lord Keeper of the Great Seal; and sworn the same day at *Whitehall* into the office of Lord Keeper, and one of the Privy-council: and the next day, being *Saturday*, sealed divers writs at the house of SERJEANT FINCH, in *Chancery-lane*; and upon the *Tuesday* following sealed again; and upon *Thursday* the 23d of *January* he rode in great state to *Westminster*, the Lord Treasurer and the Earl of *Manchester* riding on each side of him, and accompanied by the Earl Marhal, the Admiral, the Earl of *Strafford* Lieutenant of *Ireland*, and by divers other Earls, Viscounts, and Barons, and all the Justices of both Benches, and Barons of the Exchequer, and the gentlemen of the four Inns of Court, and divers others attending on him.

and is succeeded  
by Sir John  
Finch.

Upon the same day, being the first day of the Term, SIR EDWARD LITTLETON, *Solicitor* (who had his writ to be serjeant the same day, to the intent he should be made Chief Justice of the common pleas), appeared in *Chancery* and was sworn Serjeant; and on the *Saturday* following performed all the ceremonies of a serjeant, as well in his apparel as otherwise, and gave rings, *quorum scriptis fuit* \* \* \* \* \*. And BRAMPSTON, *Chief Justice*, made a short speech, declaring to him the duty of a serjeant, but did not much insist thereon, because he was to be Chief Justice of the common pleas.

Sir Edward  
Littleton made  
a Serjeant at  
Law.  
Poll. 567. 600,  
S.C.

## CASE 3.

## Dawson against Lee.

Michaelmas Term, 15. Car. 1. Roll 585.

On "*nul tiel record*" to a plea of outlawry, if the defendant fail to bring in the record, *final judgment* shall be given, and not a *respondeas ouster*.

Co. Lit. 128. b.

Cro. Jac. 484.

Yelv. 36.

Dyer, 228.

Salk. 329.

8. Co. 142.

Ld. Raym. 1014.

1. Crompt. Prac. 192.

3. Bac. Ab. 764.

**D**EBT upon a contract. The defendant after imparlance pleaded outlawry in bar. The plaintiff saith, "*nul tiel record*." And the defendant had a day to bring in the record, and failed therein.

The question was, What judgment should be given? For **HONORABLE DESDEN** said, that in the time when *Tanfeild* was their Judge, they held, that if the defendant after imparlance had pleaded outlawry, and, upon "*nul tiel record*" pleaded, had failed of the record, judgment should be absolutely given, and not a *respondeas ouster*.

And **BERKLEY** and **MYSELF** conceived it should be an absolute judgment, forasfinuch as he had pleaded in bar and did not answer over. But **BERKLEY** said, if the plaintiff would pray only that he should be awarded to answer over, he might so pray; for it is his delay only and no error. But the plaintiff, by his attorney, prayed to have it absolutely; and so it was awarded, unless other cause should be shewn the *Wednesday* following. And, after dinner in *Serjeants-Inn*, **BRAMPSTON**, *Chief Justice*, and **JONES** (who were that day in the star-chamber) being informed of this case, were of the same opinion: and so were **DAMPORT**, *Chief Baron*, and **ALL THE OTHER JUSTICES AND BARONS**, to whom it was propounded.

## CASE 3.

## Stevens' Case.

If principal be found guilty of grand larceny, and has his clergy allowed, or be burned in the hand, an accessory convicted of receiving such principal does not forfeit his land or goods.

Foster, 73.

2. Hawk. 638.

3. Com. Dig.

383.

3. Bac. Ab. 757

763.

**S**TEVENS and *Alice* his daughter were indicted at the sessions of the peace in the county of *Cambridge* before the justices of peace there, Because the said *Alice* feloniously stole a rake and a fork of the value of three shillings, and a rope of the value of eighteen-pence, and that *Stevens* the father, knowing thereof, received and comforted the said *Alice*, and so was necessary. And hereupon they were arraigned, and pleaded *not guilty*. By means of one *Spicer*, the under-sheriff, who returned two of his servants to be of the jury (as appeared by affidavit of some of the jurors), they were found guilty, and *Alice* the principal, because the goods were under value, and according to the statute, was awarded to be burned in the hand, and that she should forfeit all her lands and tenements, goods and chattels: and against the said *Stevens* judgment was given (because he had prayed his book, and was returned *legit ut clericus*), that he should be burned in the hand; and so it was done immediately to them both, and that he should forfeit all his lands and goods: and presently the under-sheriff seized the lands and also the goods and chattels of the said *Stevens*, being of the value of five hundred pounds; and returned into the exchequer, that he seized his goods only, to the value of three shillings (as it was understood at the bar). And upon the judgment *Stevens* brought a writ of error.

**GRIMSTON**, being of counsel with the plaintiff, assigned error to the judgment.

And BERKLEY and MYSELF being only in court, upon reading of the record, held it to be manifest error; for the principal not being attainted but discharged, by burning in the hand only according to the statute, the accessary ought to have been discharged without any burning in the hand, and without being put to his book; for where a man is principal, and another is accessary to him after the fact, and both of them be convicted, if the principal prays his clergy and hath it allowed, and be burnt in the hand, because he is returned *legit*, &c. the accessary is to be discharged without being put to his book; for he ought not to be condemned but where the principal is attainted, and not where he is *convicted* only, and had his clergy; and so is the common experience and practice.

Also the judgment is erroneously given, because it is that he shall forfeit his lands and tenements after such conviction and clergy allowed; wherefore the judgment was reversed. And the clerk of the crown was appointed to draw an information upon this misdemeanour for the procuring of the said *Stevens* in such an undue manner to be convicted.

STEVENS' CASE.

3. Inst. 114.  
139.  
4. Co. 43. b.  
11. Co. 35. a.

### Crawley's Case.

CASE 4.

CRAWLEY being brought to the bar upon a *habeas corpus*, directed to the mayor of *St. Alban's*, being in gaol there, it was returned upon the writ, that he was committed to the gaol by the justices of the peace of the said liberty, at the sessions of the peace holden 11th July 1639, till he should obey an order of taking the office of constable upon him: for that he being an inhabitant within the hundred of *Casbo*, within the liberty of *St. Alban's*, had refused to execute the said place.

And because it was informed on the part of the said *Crawley*, that he denied to be within the liberty of *St. Alban's*, but affirmed that he was within the county of *Hertford*, out of the said liberty,

ALL THE COURT held, that he was unjustly committed, because they ought not to have committed him when he denied to be constable, especially pretending that he was not within the liberty; but should have caused him to be indicted upon this refusal, and, if he were found to be within the liberty, should have assessed a good fine, and then have committed him for that cause. *Vide Greisley's Case (a)*. But as it is now returned, the imprisonment was not lawful: wherefore the said *Crawley*, by the opinion of the whole Court, was absolutely discharged without any bail.

The sessions cannot commit a person for refusing to take upon him the office of constable; but they may indict and fine, and commit for the non-payment of the fine.  
Co. Ent. 502.  
5. Mod. 130.  
1. Salk. 175.  
Skin 669.  
Comb. 416.  
Stra. 920. 1050.  
4. Com Dig. 171.  
Ld. Ray. 69.  
Fitzg. 192.  
2. Hawk. P. C. 102.  
1. Esp. Dig. 414.

(a) 8. Co. 38.

### Memorandum.

CASE 5.

UPON Monday 27th January 1639, SIR EDWARD LITTLETON and ROBERT FOSTER appeared at the common pleas bar, and were placed in the midst of the bar; and SIR JOHN FINCH, Lord Keeper of the Great Seal, came into the common pleas, and made long and eloquent speech to them both, signifying the king's pleasure to make SIR EDWARD LITTLETON Chief Justice of the common pleas, for his good and long service, and his certain knowledge of his abilities to serve him; and the said ROBERT FOSTER to be

Sir Edward Littleton and Mr. Robert Foster made Judges of the Common Pleas.



## MEMORANDUM.

Puisne Judge there, for his good opinion which he conceived, and the good report he had heard of him: and afterwards both of them made several speeches, giving thanks to the king, and signifying their willingness of endeavouring to perform their service to the king and his people, according to the utmost of their skill and abilities in their several places.

## CASE 6.

## Parker against Edith Bleeke.

Hilary Term, 13. Car. 1. Roll 1002.

In the sale of copyhold lands by commissioners of bankrupts, the estate is in the bargain before admittance, and the owner is no copyholder after the bargain and sale inrolled; therefore if the bankrupt die between the sale and the admittance, his wife shall lose the advantage of a custom, that

"the wives of copyholders dying tenants of the manor shall be endowed."

Ante, 550.

1. Atkins, 96.

1. Com. Dig.

541.

2. Com. Dig.

501 522.

2. Bac. Ab. 153.

Cooke's Bank.

Laws, 217.

Cowp. 481.

1. Term Rep.

600.

3. Term Rep.

470.

**TRESPASS.** Upon not guilty pleaded, a special verdict was found, that the land was copyhold land of inheritance of the manor of *Cheltenham*, in *Gloucestershire*, whereof one *Arthur Bleeke* late husband of the defendant, was seised in fee; within which manor there is a custom, amongst others, that if a copyholder seised in fee of a copyhold tenement dieth, having a wife at the time of his death surviving him, that he shall have and hold the said copyhold land during her life, and for twelve years after; and they found the statute of 13. Eliz. c. 7. of Bankrupt, and the statute of 1. Jac. 1. c. 15. and that upon complaint of the creditors a commission issued upon those statutes, directed to *WARREN* and six other commissioners, to enquire whether he were a bankrupt; and if they found him to be a bankrupt, that they, or three of them, whereof the said *WARREN* to be one, should execute the commission according to the statutes. That hereupon the said *WARREN* and three others, upon complaint of the creditors, examined the matters and adjudged him to be a bankrupt; and found that he was seised in fee of the said copyhold which was appraised to be sold to the value of six hundred pounds, that they by indenture, 5th April, 10. Car. 1. inrolled within the six months, reciting the causes wherefore they adjudged him to be a bankrupt, bargained and sold the said copyhold land to *Arthur Parker* and *William Sothorn* and their heirs, for six hundred pounds, paid and secured to be paid, for the use of the creditors of the said bankrupt. And they find a private act of parliament, made 1. Car. 1. whereby the customs of the said manor are cited and established; amongst others this custom is mentioned and confirmed, "That the wife of the copyholder shall have dower, and may have a jointure assigned for her life:" AND THAT "a copyholder of inheritance may make a grant for his life and twelve years after:" PROVIDE "That all women now living, and late the wives of any the copyholders of the said manor, dying tenants, and all the now wives of any the copyholders of the said manor, shall and may enjoy the customary lands of their now or late husbands, and be tenants for their lives and twelve years after, as if this act had never been made." And in the end of the said act there is a general clause BE IT ENACTED, "That all customs and usages heretofore used, and allowed within the said manor, concerning the having or enjoying of any the said customary lands or tenements, by any widow of any customary tenant of the same manor, or by any after-taken husband of such widows, or the heir or heirs of such wife heretofore

PARKER  
against  
BLEKE.

"after taking husband, or concerning the descending of any such  
 "lands to any other person, or in any other manner or form than is  
 "before expressed, shall be utterly void and of none effect: and  
 "that all other lawful usages and customs heretofore used within the  
 "said manor, which are not repugnant and contrary to the true  
 "meaning of this act, shall be and remain good and effectual, and  
 "are and shall be ratified by this act." They further find, that at  
 a court baron of the manor, on the 1st April 12. Car. 1. it was found  
 by the homage, that the said *Edith* survived her said husband, and  
 ought to enjoy the said tenements in which, &c. for term of life of  
 the said *Edith*, and for twelve years after: and that upon a present-  
 ment afterwards, viz. the aforesaid 1st April 12. Car. 1. and before  
 the admission of the said *Alexander Parker* and *William Sothern* into  
 the lands, in formâ prædictâ factâ, the aforesaid *Edith* was admitted  
 tenant of the tenements aforesaid, in quibus, &c. secundum consuetu-  
 dinem manerii prædicti quodque virtute admissionis prædictæ prædicta  
 EDITHA, &c. tempore quo, entered, &c.

And this was very well argued at the bar by GLYNN, for the plain-  
 tiff, and by MORETON, for the defendant; where two points were  
 insisted upon:

FIRST, Whether by the bargain and sale made by the commissi-  
 oners, by virtue of the statute of bankrupts, the estate of the copy-  
 holder was vested in the bargainee before admittance, although he  
 might not enter before admittance, for then the said *Arthur Bleke*  
 did not die tenant; and so is not within the custom that his wife  
 should have widow's estate?

1. Roll. Ab. 508.

Cro. Jac. 36.

Freem. 516.

SECONDLY, Admitting he died tenant, and the widow had such  
 an estate vested in her, whether the vendees, by the bargain and sale  
 to them before made, shall not afterwards devest the estate of the  
 wife by relation, and then the plaintiff hath a good title?

5. Burr. 2783.

BERKLEY and MYSELF argued, that the bargain and sale binds  
 the copyholder and bars his estate, and that he is no copyholder after  
 the bargain and sale enrolled (a): and the bargainee by the statute is  
 only barred to take the profits until admittance, which is for the lord's  
 benefit in respect to the fine due to him thereupon. SECONDLY,  
 We held, when the bargainee is admitted by the lord, it shall vest  
 in the bargainee, and shall have relation to the bargain and sale, and  
 shall devest the estate which the wife claimed by the custom; as in  
 the case of 7. Edw. 6. *Brook*, title "*Inrolments*," where one joint-  
 tenant bargains and sells, and before the inrolment the other dies,  
 and afterward the deed is inrolled within the six months, yet the  
 moiety only passed: and it is like the case where one bargains and  
 sells by indenture and takes wife and dies, and afterward the deed is  
 inrolled within six months, the wife shall not have her dower; and so  
 the case 22. Eliz. where mortgagee dies, his heir being in ward to the  
 king, the condition is afterward performed, and the wardship shall be  
 devested.

Judg. Ref. 161.

2. Com. Dig.

518.

Ante, 283.

Co. Lit. 186.

Ante, 217.

JONES and BRAMPSTON, *Justices*, doubted of the point, until  
 they saw that the record finds the act to be particularly, that "she

(a) Vide 27. Men. 8. c. 16. and Bac. Abr. 277.

"ought

PARKER  
against  
BLEEKE.

Judg. Ref. 161. "ought to be the wife of a tenant:" and it is not intended, that after the sale of the copyhold he should die tenant; and he did not die tenant, because the bargain and sale took his estate from him, and ousted him of the copyhold. THEY therefore agreed, judgment should be entered for the plaintiff.

## CASE 7.

## Bathell's Case.

Hilary Term, 9. Car. 1. Roll 958.

Judgment in  
Wales need not  
say "*magna*  
"*sessionis*;" and  
a venire in the  
name of "*A. B.*  
"*late sheriff*."  
Ante, 189.  
Post 572.  
Carth. 56.  
Stra. 316.  
Dougl. 6.

ERROR of a judgment in the grand sessions, before the Justices in the county of *Flint*. Divers errors were assigned and overruled in *Michaelmas Term* last; and now two errors only were insisted upon:

FIRST, That the judgment was, *coram justitiariis in comitatu FLINT*; and he doth not say, *magna sessionis in comitatu FLINT*.—*Sed non allocatur*; for there are many of their records as well the one way as the other, and good both ways.

SECONDLY, Because the *venire facias* was returned *per THOMAM HAMOND militem, nuper vicecomitem* of the said county; so it was not returned by the sheriff, but by one who was late sheriff: and it appears not that he was sheriff at the time of the panel made, for he ought to have subscribed his name, *THOMAS HAMOND vicecomes*; which error is not aided by any statute.—*Sed non allocatur*: for although the writ be returned by *J. S.* the sheriff, at the time of the grand sessions, when the said action was tried, as a writ delivered to him by the said *Thomas Hamond* his predecessor, *in exitu ab officio suo*, with this return indorsed; yet it might be very well intended, that the panel was made and annexed in the time when he was sheriff: and this addition, *THOMAS HAMOND nuper vicecomes*, is sufficient proof when he is discharged of his office. Whereupon the judgment was affirmed.

See 21. Jac. 1. c. 13. and 20. Geo. 2. c. 37.

## CASE 8.

## Ireland against Lockwood.

Trinity Term, 15. Car. 1. Roll 1181.

An action lies  
for saying of a  
taylor that he  
cheated in his  
trade, *per quod*  
he lost divers  
customers.  
Ante, 552.

1. Roll. Ab. 545.  
2. Roll. Ab. 683.  
1. Saund. 73.  
Jones, 450.  
1. Sid. 343.  
Cro. Jac. 502.

ERROR upon a judgment in *Bath* in an action on the case for words. WHEREAS the plaintiff was a taylor, and used and exercised the trade of a taylor in *Bath*, and was a freeman of the said town, and had divers customers in the county of *Wilts*, who used to employ him in his trade; that the defendant at *Bath*, within the jurisdiction of that court, said of him, that "He cheated in his trade;" and other such words, much slandering him in his trade; by which means he lost divers of his customers in *Bath*, and in the county of *Wilts*; and they withdrew themselves from him, to his damage, &c.

The defendant pleaded not guilty; and found against him, and damages assessed to one hundred marks, and judgment for the plaintiff: and error thereof brought and assigned, that the words were not actionable.

BUT IT WAS CLEARLY HELD, that they were actionable.

GRIMSTON



GRIMSTON then moved, that the jurors in *Bath*, being within a private jurisdiction, ought not to have assessed damages for the loss of his customers in the county of *Wilts*.

BERKLEY, *Justice*, much insisted upon it, that for this cause the judgment was erroneous, as it was resolved in the case, where an *assumpsit* brought in *Windsor court* by one within the jurisdiction thereof, that *J. S.* upon a valuable consideration, did promise to bring to him so many loads of billets from *Hedisset*, in the county of *Bucks*, to *Windsor*. After verdict, upon not guilty pleaded, and found and adjudged for the plaintiff, the judgment was reversed. Because, it being a private jurisdiction, they have no authority to inquire of any matter out of the same.

JONES, BRAMPSTON, and MYSELF, agreed that case to be law; but we held, that this is only an allegation in respect of damages, for the increase of them, which they may inquire of in any place whatever: wherefore the judgment was affirmed.

The jury in an inferior court may find matter that is only incidental to the issue, although done out of the jurisdiction.

1. Roll. Ab. 545.

1. Sid. 95.

1. Saund. 73.

T. Jones, 103.

230.

3. Keb. 677.

1. Vent. 28.

Ld. Raym. 796.

2. Com. Dig. 612.

Cowp. 18.

1. Term Rep.

151.

### Bulley against Hubbins.

#### CASE 9.

ERROR of a judgment in the court of THE MARSHALSEA, in an action upon the case upon a promise, at the parish of *Saint Clement's Danes*, within the jurisdiction of that court, in consideration of such a sum received, that he would pay him such a sum when he returned into *England* from *Hamborough* (being a place beyond the seas); and alledges, that he such a day went over sea to *Hamborough* aforesaid, and returned such a day to the parish of *Saint Clement's Danes*, and that he demanded the money, and the defendant had not paid. After *non assumpsit* pleaded, verdict and judgment for the plaintiff, error was brought and assigned,

FIRST, Because he doth not alledge, that he gave notice to the defendant of his return.—And although it be alledged, that the defendant, *habens notitiam inde*, and upon such a day requested, had not paid, yet IT WAS HELD clearly, that the declaration was insufficient for this cause, for he ought to have alledged express notice, and shewn the day and place of such notice given.

SECONDLY, Because it is brought of an act to be done at *Hamborough*, out of the jurisdiction of the marshal's court, being a private jurisdiction;—which was held also to be a manifest error: for which causes the judgment was reversed.

In an action on a promise to pay when the plaintiff returned to *England*, it must be expressly averred that he gave notice to the defendant of his return.

Hob 68.

Cro. Jac. 57.

150.

1. Roll Ab.

469. con.

1. Lutw. 379.

An inferior court cannot hold plea of matters out of its jurisdiction.

1. Term Rep. 151.

Cro. Jac. 503. 5 Com. Dig. 160 Cowp. 18.

### Scavage against Hawkins.

#### CASE 10.

ERROR of a judgment in debt upon a lease for years. The error assigned was, Because the plaintiff in debt counts, that his father was seised in tail, and made that lease for years, rendering rent, and died seised of the reversion, which descended to him as son and heir of his body; and doth not shew the beginning of the said estate, which generally ought to be set forth where he claims by a particular estate (otherwise it is where he counts of a seisin in fee).—But because this was in a count, and not in a bar, nor in an

avowry, without shewing commencement of the estate in tail, but in a bar or in an avowry it must be shewn. Ante, 103. 138. 575.—Jones, 453. Co. Lit. 303. Cro Eliz. 18. 407. Salk. 562. Comb. 27. 472. 476. Velv. 147. Carth. 444. 2. Mod. 79 4. Mod. 419. Ld. Ray. 332. 3. Com. Dig. 78. Cowp. 682. Dougl. 158, 159. 656.

A declaration in debt for rent on a lease for years, stating that it was made by tenant in tail, and that the reversion descended to the plaintiff in fee,

avowry,

SCAVAGE  
against  
HAWKINS.

avowry, and there were produced precedents out of the common pleas, that such counts are usual there, it was therefore held to be no error, and the judgment was affirmed. 21. Hen. 7. pl. 26. 34. Hen. 6. pl. 48. 2. Edw. 4. pl. 11.

## CASE II.

## Bryan against Wikes.

A variance in the style of an inferior court between the entry on the roll and the return on the process, is immaterial.

Ante, 570.

Cro. Jac. 114.

331.

Cowp. 178. 474.

1. Term Rep.

239, 240.

**E**RROR of a judgment in *Leicester*, in an action on the case for words.

THE FIRST ERROR assigned by *Babington* was, Because the style of the court was, "*PLACITA coram J. S. Majore, et JOH. CHAPMAN, Recordatore, et J. D. et J. N. Aldermannis burgi prædicti secundum consuetudinem burgi prædicti, &c.*" and the plaint being entered, upon summons, a *non est inventus* was returned at a court holden *coram dicto J. S. Majore, et J. N. et J. D. Aldermannis, secundum consuetudinem burgi prædicti, &c.* omitting the Recorder, which *BABINGTON* alledged to be error, *et coram non judice*.—*Sed non allocatur*; for it may be, that at the first court holden the Recorder was there, and at the second court he was absent, and the court is well held by the custom there before the mayor and two aldermen.

THE SECOND ERROR assigned was, Because the judgment there is in an action for words which the defendant spake of the plaintiff, *viz.* "He hath stolen a tree formerly cut down, which is felony, and "I will cause him to be indicted for felony." *BABINGTON* alledged, that the words were not actionable, because he doth not shew when the tree was cut down, nor that there was some space of time between the cutting and taking away; for if it was not taken away instantly after the cutting, it was not felony.—*Sed non allocatur*; for the words are clearly actionable: for when he saith, "that he stole a tree formerly cut down;" it is intended to be a long distance of time; especially when he adds, "and that is felony, and I will indict him of "felony;" for it shews, he conceived he had committed felony, which was a great slander. Wherefore the judgment was affirmed.

## CASE 12.

## Owen against Long and Others.

*Michaelmas Term, 15. Car. 1. Roll 571.*

Justification of a commitment by the court of requests in *London*.

**T**RESPASS of assault, battery, and imprisonment, in the parish of *Saint Nicholas in Basing-street*, for two days. The defendant justifies by reason of a special act of parliament for the relief of poor debtors, 3. Jac. 1. c. 15. s. 5. (a), whereby it was enacted, "That every poor citizen and freeman inhabiting in *London*, being "sued for debt under forty shillings, may exhibit his suit in the court "of *London* called there the Court of Requests in *London*, who shall "nominate commissioners (b) to the number of twelve, and that any "three of that commission may send for any creditor who is complained of in suing for such debt under forty shillings, and if he "refuse to come, or perform not their orders, they may cause him "to be arrested by any serjeant of *London*, and commit him to "prison, there to remain until he perform the said order." And the defendant saith, that by reason of the command of such commissioners, at such a parish in *Wood-street*, because he refused to

(a) Explained and extended to inhabitant, generally by 14. Geo. 2. c. 10.

(b) See 25. Geo. 3. c. 45. s. 7. as to the qualification of the commissioners.

come before them, he was committed to the compter in *Wood-street*; *et hoc paratus est verificare*. Upon this the plaintiff demurred.

OWEN.  
against  
LONG and  
OTHERS.

PHEASANT, for the plaintiff, took divers exceptions to the plea:

FIRST, Because he doth not shew, that the debtor who complained was poor, and a citizen and freeman inhabiting in *London*, otherwise the act doth not give them authority to meddle (a).

(a) See vide  
14. Geo. 2. c 10.

SECONDLY, Because the battery and imprisonment is alledged in the parish of *Saint Nicholas*, and he justifies in another parish, and doth not traverse the battery and imprisonment alledged in the declaration.

Ante, 228.

THIRDLY, The conclusion of the plea is not well, *et hoc paratus est verificare*, where there are two defendants, for it ought to have been *parati sunt*, &c.

Post. 394.  
COWP 425.

### Martyn against Nichols.

CASE 13.

ERROR of a judgment in an ejectment. The error assigned, Because the declaration was of a messuage and forty acres of land, meadow and pasture, thereto appertaining, and it was not distinguished how much there was in land, how much in meadow, and how much in pasture.—Therefore the judgment was reversed.

Ejectment of so many acres of land, meadow, and pasture, must describe the several quantities of

each. Ante, 179. 471.—2. Roll. Rep. 166. 189. 1. Salk. 254. 1. Show. 338. 4. Mod. 97. Hard. 57. Palm. 100. 2. Bac. Ab. 169. 5. Com. Dig. 274. 5. Burr. 2672. Carth. 204. Cowp. 347. Dougl. 466. 1. Term Rep. 11.

### Canwey against Aldwyn.

CASE 14.

Michaelmas Term, 15. Car. 1. Roll 132.

ASSUMPSIT. Whereas the plaintiff, at the defendant's request, amended such A BOAT, and divers other boats of the defendant's; that the defendant promised to satisfy and pay him for his labour and charges about the amendment of the said boats *tantum quantum meruit*: and alledges in fact, *quod meruit* thirty pounds, and that he required the payment of the defendant, who had not paid him according to his promise.

In *assumpsit*, an allegation that the plaintiff, at the request of the defendant, amended A BOAT, and divers other boats, is sufficiently certain, with an averment *quod meruit* such a sum. Ante, 77.

The defendant pleaded *non assumpsit*; which was found against him.

GRIMSTON now moved in arrest of judgment, that the declaration was not good, because he alledged, that he amended and repaired divers boats for the defendant, and shews not what; so by reason of that uncertainty the defendant cannot know how much he should pay; and therefore compared it to *Playter's Case* (b), where trespass was brought *quare pisces suos cepit*, and adjudged ill for the uncertainty.

Yelv. 111.  
Cro. Eliz. 276.  
435.

BERKLEY, at the first, was of that opinion; but upon better advisement, and reading over the record, "that he mended ONE and divers others," and upon a precedent cited by MYSELF, that an action had been maintained here by a taylor for making A GOWN and divers other suits of apparel at the defendant's request, and that he promised to satisfy and pay *tantum quantum*, &c. and HODDESSEN affirming there were divers precedents in the court of this nature,

1. Sid. 413.  
2. Saund. 373.  
Raym. 8.  
3. Bulst. 31.  
1. Roll. Rep. 173.  
Salk. 557.  
1. Com. Dig. 153.  
Cowp. 682.

(b) 5. Co. 34.

JONES,



CANWEY  
against  
ALDWYN.

JONES, BERKLEY, and MYSELF, agreed, that the declaration was good, and there was not any such uncertainty but that the defendant (at whose request the said boats were amended) might well take conuſance what boats he deſired to have repaired: and the verdict finding *quod aſſumpſit*, and aſſeſſing damages, judgment was given for the plaintiff.

CASE 15. Anne Healings, Widow, against The Mayor, Commonalty and Citizens of London.

Judgment  
against a corpo-  
ration, omitting  
part of the cor-  
porate name,  
may be amended  
by the docket  
roll.

Ante, 410.

Post. 581. 594.

Moor, 869.

Cro. Jac. 628.

ERROR of a judgment in the common pleas in debt, brought by them upon an obligation of four hundred pounds. The error assigned was, Because the judgment is, that the mayor, commonalty, and citizens of London, should recover the debt and six pounds for costs *eisdem majori et communitati* adjudged (omitting *civibus*), and so no such corporation:—which was held to be error. But afterwards, upon a motion in the common pleas, and upon examination and perusal of the docket-roll (a) (where it was well entered), it was awarded to be amended.

Hob. 127. Raym. 39. 1. Sid. 70. 3. Term Rep. 749.

(a) See 4. & 5. Will. & Mary, c. 2.

CASE 16. The King against Sir John Dryden, Gybbes, and Others.

In a writ of  
right of ad-  
vowson against  
coparceners, or  
joint-tenants,  
if one of them  
die *puis darrein*  
*continuance*, the  
writ shall abate;  
but not in the  
case of *novel*  
*disseisin* or *mort-*  
*d'ancestor*.

Vide ante, 511.

426 509.

Post. 583. 585.  
589.

Jones, 452.

Bro. Brief, 295.

400.

Bendl. 74.

Hard 113.

Show. 56.

3. Mod. 249.

Cro. Jac. 19.

RIGHT OF ADVOWSON against them as coparceners. Upon a special verdict by the grand assise, it was shewn that the tenants were coparceners, and that *Margaret Gybbes*, one of the tenants, was dead *puis darraigne continuance* before this Term, which was pleaded in abatement of the writ. The king's attorney hereupon traverseth that they were parceners; and upon that it was demurred.

Being moved in court, it was adjudged, without argument, that the writ should abate, and it was appointed that judgment should be so entered; for ALL THE COURT agreed, although it were admitted they were not coparceners, but joint-tenants, yet the death of one of them shall abate the writ being in a real action. And it is not like to the case of an *assise of novel disseisin*, or of an *assise of mortd'ancestor*, where death of one of the tenants shall not abate the writ as long as there is a tenant living; for it is here allowed that every of them is tenant of a freehold. And although the attorney-general affirmed there were two express Books in the point, yet upon view of the said Books (b) they conceived they do not extend to this case; for it was only in a *scire facias* upon a *petition de droit*, which differs from this case. But it was afterward adjourned by Mr. Attorney's importunity until *Easter Term*, pretending that he would then argue the case (c).

(c) It was moved again in *Easter Term*; and adjudged in the *Michaelmas Term* following, upon great argument, that the writ should abate. Vide post 583. 589.

(b) The YBAR-BOOKS 13. Edw. 3. tit. 1. Assise, 12. 1. Edw. 3. pl. 12. 6. "Breve," 260. and 27. Ed. 3. pl. 83. Edw. 3. pl. 270. 7. Edw. 3. pl. 300. Vide 7. Hen. 4. pl. 33. Tempus Edw. 1. 43. Edw. 3. pl. 16. 12. Hen. 6. 2. "Breve," 857, 858. 40. Assise, 15.

Smith *against* James.

CASE 17.

**E**RROR of a judgment in the court of the palace of *Westminster* by the principal and bail.

The error assigned was as well in the principal judgment as in the execution *against* the bail; and it was moved by GRIMSTON, that therefore the writ of error was not well brought.—And ALL THE COURT were of the same opinion; whereupon the writ of error was abated.

Bail cannot bring a writ of error on the principal judgment.  
Ante, 300. 402. 561.

Cro. Eliz. 155. Hob. 72. 5. Com. Dig. 291.

Cro. Jac. 384.  
1. Roll. 792.

They then brought several writs of error *quæ coram vobis resident*. And the error assigned by the principal was, That the declaration was ill; and upon reading the record, it appeared in his declaration, that upon 23. December, 13. Car. 1. in consideration of such a sum of money, the defendant assumed and promised, that he, 23 January, 13. Car. 1. would pay such a sum of money to the plaintiff.—And because it appears by his own shewing, that this action was brought before there was any cause of action, THE COURT held, that the declaration was ill, and the judgment (although it was after verdict for the plaintiff) was erroneous, and therefore reversed.

A declaration that the defendant assumed the 23 December, when it appears that he assumed the 23 December to pay 23 January, is bad.  
Ante, 272. 282.

The writ of error by the bail, therefore, is not examinable, but falls of itself.

1. Roll. Ab. 792.  
Cro. Eliz. 325.  
Cro. Jac. 70.  
Hob. 196.  
2. Lev. 197.  
Dig. 105, 106.

Carth. 114. 1. Show. 147. 1. Leon. 186. Yelv. 70. Jones, 304. 1. Com.

Sands *against* Trefuses.

CASE 18.

**A**CTION ON THE CASE, for stopping a water-course running to his mill; and declares, that he was seised in fee of a mill, and had a water-course running in the defendant's land to the said mill, and that the defendant had stopped his water-course. The defendant pleads a vitious plea; whereupon the plaintiff demurred.

And now BEARE, *for the defendant*, moved in arrest of judgment, that the declaration was ill, because he doth not declare that his mill was an ancient mill, and that the water-course was an ancient water-course, nor doth he prescribe to have a water-course in the defendant's land.

In an action for stopping a water-course to a mill, it is not necessary to shew the *que estate*, or that it was an ancient water or mill.  
Ante, 500.

But ALL THE COURT held it to be well enough, and may well maintain his action upon the case, being lawfully in possession, and the stopping of the water is tortious, and a damage to his mill; and although he doth not shew *que estate*, that is not material; and it hath been divers times so ruled, viz. 33. Eliz. in *Sly v. Mordant*. But because this was moved the last day of the Term, day was further given until the next Term.

1. Ven. 237. 239.  
1. Show. 7.  
Cro. Jac. 43.  
1. Leon. 247.  
See Carth. 444. and the cases there cited.  
3. Term Rep. 767.

Earl of Oxford *against* Waterhouse.

CASE 19.

**E**RROR. After a special verdict and argument at the bar, there was a *discontinuance* entered by the plaintiff, as it was agreed he might; and it was moved, that costs might be assessed for the defendant.—But THE COURT doubted whether costs might be assessed, because there was no verdict given in the cause.

The defendant shall have costs, if the plaintiff enter discontinuance after special verdict.

Ante, 175.—1. Roll. 713. R. 689. Leon. 105. Hutt. 36. Hardres, 152. 1. Bac. Ab. 525. Carth. 87. 2. Com. Dig. 549.

## CASE 20. The Mayor and Commonalty of London against Alford.

Lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a schoolmaster, &c. and if they should not pay such sum, then to B. and if he do not perform such trust, then to C. this second limitation to C. is void, it being a possibility after a possibility. Ante, 284.

Co. Lit. 234.  
10. Co. 42.  
1. Roll. Ab. 411.  
1. Leon. 283.  
Owen, 8.  
1. Atk. 259.  
1. Vezey, 420.  
3. Burr. 1416.  
See Mr Fearn's Essay on Contingent Remainders,  
4. edit. 378.

**TRESPASS.** Upon a special verdict, upon not guilty pleaded, and tried at the bar, the case was:

*Sir George Monox*, formerly mayor of *London*, being seised in fee of twenty messuages in *London*, holden in burgage, where the custom is, that they are devisable as well in *mortmain* as otherwise, erected an alms-house and a school-house in *Walthamstow*, in the county of *Essex*; and for the maintenance of the same alms-house, school-house, and a chapel there, he devised by his will in writing, the 33. *Hen. 8.* those tenements whereof one of them is now in question, to *Giles Briggs*, *Roger Alford*, and four others, whom he made his executors, HABENDUM to them, their heirs, and assigns: RECITING, That whereas he had erected an alms-house in *Walthamstow* for thirteen poor people, and a school-house and chapel there, he devised those tenements to the said six persons, and to their heirs and assigns, upon condition, and to the intent and effect, that his said executors and feoffees, their heirs and assigns, should pay, out of the issues and profits of the said houses, 42l. 7s. 4d. in manner and form following, viz. to an honest priest which shall be schoolmaster and teach children, 6l. 13s. 4d. yearly, and also pay weekly to the poor alms-people there 7d. a piece, and 5s. yearly to be bestowed upon an *obit*; and to pay to an able clerk to help to teach the children there 26s. 8d. and other charitable uses. And if any part of the said purposes remain undone and unperformed, then they find, that he devised the same to *William Monox*, and to the heirs males of his body, upon condition and to the intent to perform all the said trusts and purposes; and if he failed for two months, then he devised them to the mayor and commonalty of *London*, upon the same conditions, and to repair *London-bridge*; and if they failed, that his heir should enter and perform the same: and by a schedule annexed to his will he appoints and adds some other conditions to the said estate; and appoints, that none of those devisees should hold by survivor, but that the heir of him who died should have his part. It was further found, that in 35. *Hen. 8.* the said *Sir George Monox* died seised in fee, and that the said six devisees entered and enjoyed the tenements, but that none of them paid the sums appointed to the clerk who was to attend in the chapel, but had failed in that point. They further found, that the said *Roger Alford* died in *Edw. 6.* and that *Edward Alford* was his heir, and entered into his part, but hath not performed the trust in this point; that in 5. *Eliz.* the heir of *Sir George Monox* entered for breach of the condition, and that *Edward Alford* entered and ousted him; and that afterwards the said *Edward Alford* purchased the parts of the other devisees by deeds indented and enrolled in the *Hustings*, who in 11. *Eliz.* bargained and sold all their estates and rights in the said tenements to the said *Alford* and his heirs, upon trust that he should perform the purposes and declarations in the will of the said *Sir George Monox* appointed; and that the said *Alford* was in possession; and that afterward, viz. 35. *Eliz.* he being in possession, A FINE *sur release with proclamation* was levied to him, and that he continued his possession, and died seised, which land descended to the defendant his son. They find further, that the



sum of 26s. 8d. was never paid to the said clerk to this day, and that neither the said heir of *Sir George Monox*, nor the mayor of London and commonalty, had any notice of this will, nor of the conditions, nor of the non-payment, until within these four years last past; and that after notice the mayor and commonalty entered, and *Alford* re-entered, whereupon the action was brought. *Et si super totam, &c.* judgment shall be given for the plaintiff? was the question.

THE MAYOR,  
&c. of LONDON  
against  
ALFORD.

It was very well argued at the bar for the plaintiff, and by Serjeant FINCH for the defendant.

Upon this argument three main questions were made: FIRST, Whether this be a condition or limitation appointed by the will? and admitting it be a limitation, and that it may, after the first limitation, be good to the heir of *Sir George Monox*, Whether such limitation may be good to the mayor and commonalty, being but a possibility?

SECONDLY, Admitting that they be limitations and good limitations of the estate of the devisees, this being broken in the first year, and so *de anno in annum*, Whether there be a good title of entry for the heir of *Sir George Monox*, and after to the mayor and commonalty, for not performing of the trusts? and, they not having entered, but suffering a fine with proclamations, and five years to pass, Whether this be not a bar to their entry?

A fine bars a title of entry for a condition broken.

S. C. 1. Jones, 452.  
1. Ch. Rep. 64.  
Cro. Jac. 592.  
4. Co. 105.  
Cruise, 146. 199.

2. Inst. 518. 2. Vern. 190. note (2). Co. Lit. 240.

THIRDLY, Admitting there hath not been performance of the will, but a breach of the trusts, Whether the want of notice shall aid them? because the words of the will are, "If through oblivion or other cause the trusts be not performed, then they shall re-enter."

4. Co. 82. b.  
R. 408.  
R. 654 725.  
R. 729.  
Dyer, 33. a.  
Co. Lit. 18. a.  
Cro. Jac. 146.

THE COURT resolved, that the fine with proclamations, and the five years passed, hath absolutely barred the plaintiff's estate: and they conceived also, that it is a void limitation to the mayor and commonalty, being a possibility upon a possibility: *Vide 1. Coke, Rector de Cheddington's Case*: and that the finding they had not notice was not material, for there is not any appointed to give notice, and they at their peril ought to take notice of breach of the estate. But for these two last points, they were not so unanimously resolved; but for the second they all absolutely held, that the fine with the proclamation, and the non-claim and five years passed, hath absolutely barred them: whereupon judgment was given against the plaintiffs.

Easter

Faint, illegible text at the top of the page, possibly a title or header.

Faint, illegible text in the upper middle section, possibly a list or index.

Faint, illegible text in the middle section, possibly a list or index.

Faint, illegible text on the right margin.

Faint, illegible text on the right margin.

Faint, illegible text on the right margin.

## 16. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*Sir John Banks, *Knt. Attorney General.*Sir Edward Littleton, *Knt. Solicitor General.*} *Justices.*

## Freeman's Case.

## CASE 1.

**F**REEMAN was brought to the bar by *habeas corpus* out of the *Fleet*; and the return was, that he was committed on the 14th February 1639 by the Lords of the Privy-council, "for divers causes" and misdemeanors, until they gave order to the contrary," as appeared by their warrant there produced. It was also returned, that he was to be detained by another warrant from the said Lords, 26th April 1640, wherein is mentioned, that he, being warned by a messenger in December to appear before the said Lords, refused to come before them, and in contempt made a *rescous*, and caused thereby a great tumult in the town; which being proved before the said Lords, by the oath of two persons therein named, they thereupon, the 14th February 1639, committed him: and now by this warrant appointed the Warden of the *Fleet* to retain him, until they gave further order, &c.

BAGSHAW, for the prisoner, hereupon moved, that he might be discharged, or at least bailed.

As to the first return, THE COURT held, if there had not been a second commitment returned, he ought to have been bailed; but for the second, they gave time until *Saturday* for the king's counsel to maintain the return, and to shew cause why he should not be bailed: and the king's counsel said, they would proceed against him by indictment or information; and that there were divers precedents where such informations have been brought in this court for misdemeanours.

A person committed by the Privy-council is entitled to be bailed if the warrant do not express a sufficient crime with convenient certainty.  
Post. 593.  
Ante, 133. 507.  
552. 558.  
1. Bl. Rep. 576.  
Ld. Raym. 1108.  
1. Bac. Ab. 381.  
2. Hawk. P. C. 169. 185, 186.

## Anonymous.

## CASE 2.

**O**NE J. S. upon an *habeas corpus*, was brought to the bar, and returned, that he was committed by order of the exchequer, 9. Car. 1. for not paying of a fine of fifty pounds by the ecclesiastical commissioners imposed upon him.—And although it were not shewn wherefore the said fine was imposed, yet because that commitment was by a judicial court, this Court would neither bail nor discharge him.

Vaugh. 137. Palm. 456. 3. Com. Dig. 456. 2. Hawk. P. C. 170. 173. 2. Term Rep. 190.  
4 Term Rep. 220.

2. Inst. 55.

2. Term Rep. 190.

## Norton against Acklane.

## CASE 3.

Hilary Term, 15. Car. 1. Roll 549.

**C**OVENANT upon an indenture of demise by the plaintiff to the defendant of an house for years; wherein the lessee covenants for him and his assigns to repair the house from time to time, after an assignment of the term, and after acceptance of rent from the assignee.

Covenants lies by a lessor against his lessee for a breach committed.  
Ante, 188. S. P.

1. Roll. Ab. 522. 3. Co. 24. 1. Saund. 240. 3. Lev. 133. 1. Sid. 402. 2. Vent. 234. Cowp. 83. Doug. 461.

and



NORTON  
against  
ACKLANE.

and to leave it at the end of the term sufficiently repaired: and for not repairing assigns the breach.

The defendant pleaded, that he assigned (by indenture shewn in court) all his estate and interest in the term to *John S.* such a day and year, who entered and paid his rent at such a Feast after to the plaintiff the lessor, who accepted thereof; and that there was not any default of reparations before the assignment. Upon this plea the plaintiff demurs.

BROOM, for the plaintiff, shewed, that the action well lies against the lessee, notwithstanding this acceptance of the assignee to be his tenant, or against the assignee at his election; and he said, that it was adjudged so in this court in *Brett v. Cumberland* (a), the record whereof is entered in *Hilary Term, 14. Jac. 1. Roll 1486.*

And BRAMPSTON and MYSELF were of the same opinion (JONES and BERKLEY being then absent). And because we conceived the case to be clear, and so adjudged in the case last cited, we gave rule, that judgment should be given for the plaintiff, unless, &c. And JONES and BERKLEY, being informed thereof at *Serjeants-Inn*, agreed, that the action well lay.

(a) Cro Jac.  
321.  
See also S. P.  
Barnard v.  
Godscall,  
Cro. Jac. 309.  
2. Com. Dig.  
563.

## CASE 4.

## Anonymous.

*Hilary Term, 15. Car. 1. Roll 1656.*

Qu. What process shall issue upon inquisition returned to a *noctanter*.  
*Vide ante, 280. 440. and the cases there cited.*  
2. Com Dig.  
431.

A WRIT OF DISTRINGAS, "*villatas circumadjacentes ville de Dorling, ad levandum sepes et fossatas, &c. prostratas per diversas personas ignotas, et ad acquirendum, &c.*" which inquisition being returned, and the malefactors unknown, they found damages, by virtue of the statute of *Westm. 2. c. 46.* And hereupon the king's attorney prayed a *distringas* against the inhabitants.—And whether he should have it without a *scire facias* sued to answer, and what process he should have, was much doubted: wherefore the Court would advise thereof.

## CASE 5.

## Reymond against Burbedg.

*Trinity Term, 15. Car. 1. Roll 1656.*

In debt against an attorney by bill, a judgment quod querens nil capiat PER BREVE instead of per billam, shall be amended.  
*Ante, 574.*

1. Roll. Ab. 206.  
416.  
Hob. 327.  
Hutton, 41.  
Cro. Jac. 633.  
1. Vent. 12.  
Cowp 407.

ERROR upon a judgment in the common pleas in debt upon an obligation, conditioned for performance of an award. Upon demurrer (because it was conceived the arbitrament was void), judgment was given for the defendant, *quod querens nihil capiat per breve.*

GODBOLD, for the plaintiff, now assigned, That it was error, for the action was there brought by an attorney by a bill of privilege, and not by original writ; so the judgment ought to have been *nihil capiat per billam*, and not *nihil capiat per breve.*

And IT WAS HELD a manifest error, unless it were the mistake of the clerk and amendable; but THE COURT doubted thereof, because it was in the judgment, which is by the Court, and is not to be accounted the entry of the clerk only. An error of a judgment in trespass against a bishop for omitting *ideo capiatur pro fine* was resolved (a) to lie well enough without it, for a *capias* lieth not against him. But for this point the Court would advise.

(a) Dyer, 315.

Join

John Bishop of Salisbury against Hunt and Others.

CASE 6.

Trinity Term, 15. Car. 1. Roll 543.

**T**RESPASS for carrying away two loads of wheat, being set out for tithe, severed from the nine parts at *Stapleham*, in the parish of *Damorham*. The defendant pleads, that queen *Elizabeth* was seised in fee of the rectory appropriate of *Damorham*, and being so seised by her patents, dated 20th June in the twenty-second year of her reign, granted and demised the tithe of corn and hay growing in *Damorham* and *Stapleham* to *Anthony Ashley* for his life, remainder to *Robert Ashley* for his life; that *Anthony Ashley* was seised for life and died, and afterwards *Robert Ashley* surviving was seised; and that the defendants, by his command and as his servants, took the said loads of wheat, &c. The plaintiff replies, That before the grant to *Anthony Ashley* and *Robert Ashley*, queen *Elizabeth*, in the fifteenth year of her reign, by her letters patents, granted the said tithes to *Thomas Stockman* for twenty-one years; and that in the seventeenth year of her reign, by her letters patents reciting the said lease, she granted the reversion of the said tithes to the bishop of *Salisbury* and his successors, and entitles himself as successor, and that the tithes were severed, &c. and the defendants had taken them, &c. Upon this replication the defendants demurred generally.

**MAYNARD**, for the defendants, shewed the cause to be, For that the defendants entitle themselves by grant from queen *Elizabeth*, in the twenty-second year of her reign, and the plaintiff claiming by queen *Elizabeth* doth neither confess and avoid, nor traverse, &c. And being argued at the bar,

**BERKLEY** and **MYSELF** held, that the plaintiff needs not to confess and avoid, nor traverse, when he claims by a former grant from the said queen, viz. anno 17. regni sui, which precedes the title alleged by the defendants: and if it be not a good grant, the defendants, who claim by a latter grant, ought to have traversed the precedent grant to the plaintiff, which is presumed to be good until the contrary be shewn; and the plaintiff needs not to answer to a puisne grant, alleged to be after his grant: and cited the case 6. Co. 24. *Hiler's Case*, and 2. Edw. 6. Br. "Confess. et Avoid." 66. *Dyer*, 66. 10. Edw. 4. 6.

But **BRAMPSTON** and **JONES** doubted, Because the queen might adventure have a later title and make a good grant.

This being argued in *Hilary Term*, was adjourned until this Term: and now **BRAMPSTON** said, that he had considered of the Books cited, and agreed that the plaintiff claiming by a former grant needs not to make either a confession and avoidance, or traverse. Whereupon rule was given (*JONES absente*), that judgment should be entered for the plaintiff, unless, &c.

Plowden against Oldford.

CASE 7.

Michachnas Term, 15. Car. 1. Roll 86.

**E**RROR of a judgment in the common pleas, The case upon the record was, That parson, patron, and ordinary, before the 3. Eliz. c. 10. made a lease for ninety-nine years, there being a presentee of the next avoidance, and after the death of the incumbent, a presentee of the next avoidance enters, and avoids the lease by the parson, and dies, and then the parson presents a new incumbent, such presentee shall hold the benefice discharged of the lease by the parson, although it were confirmed by the patron who presented him.

CRO. CAR.

P p

grant

*Trespas*, for carrying away tithes. *Plea*, a grant of them from the Crown. *Replication*, a PRIOR grant. The plaintiff need not confess and avoid, or traverse the subsequent patent; for by possibility the queen might have a new title after the first and before the second grant. Ante, 324. Yelv. 151. Cro. Jac. 299. 681. *Dyer*, 171. Cro. Eliz. 30. 650. 6. Co. 25. Hobart, 102.

**FLOWDEN**  
against  
**OLDFORD.**

8. C. Jones, 454.  
1. Roll. Ab. 480.  
7. Co. 8.  
10. Co. 43.  
Hob. 7. 225.  
Co. Lit. 46. 2.  
Dyer, 72.  
Mod 67. 481.  
3. Bac. Ab. 387.

grant of the next avoidance before this lease. Afterwards the parson who made this lease died. The grantee of the next avoidance presents another, who, being admitted, instituted, and inducted, entered and avoided this lease during his time, and afterward died. The patron, who joined in this lease for years, presents a new incumbent, who was admitted, instituted, and inducted.

The question was, Whether he shall hold it discharged of this lease for years, as his predecessor did.

And ADJUDGED that he should; for the lease is totally avoided by the entrance of the second incumbent, and not for his time only. JONES and BERKLEY were of this opinion (for BRAMPSTON and MYSELF were in chancery); and their reason was, Because the parson hath the entire fee, as a parson may have of a rectory presentative: and when he is in, and hath evicted the lessee, it is an absolute eviction of the entire term, without expectation of reviver; and it is not only an eviction for himself, but for all his successors. Wherefore they gave rule, that judgment should be affirmed. And this being reported to BRAMPSTON, *Chief Justice* of this bench, to LITTLETON, *Chief Justice* of the common pleas, to DAMPORT, *Chief Baron*, and to MYSELF, we all agreed to that judgment.—And afterward the case being moved again by GODBOLD, *Serjeant*, to have day till next Term to speak in arrest of judgment, THE COURT would not give any further day; but the judgment was affirmed.

## CASE 8.

## Torle's Case.

Persons committed by the high commission court for disobeying their orders bailed by the king's bench.

Ante, 114. 220.

4. Inst. 327, 8.

**TORLE** and four others of the parish of *St. Bartholomew* were brought to the bar by *habeas corpora*: and by the return it appeared, That they were committed to a messenger for contempt to the ecclesiastical commissioners (a) for not performing of their orders in paying the parish-clerk his wages, rated by their order at fourpence the quarter for every house in *Great St. Bartholomew's*, which they refused to pay but according to their custom, as they were rated by their churchwardens and vestry.

DR. MERRICK and DR. ECLESTON now moved, that they should be remanded; for they said, this order was grounded upon the king's letters patents, wherein it is provided, that the clerks should gather and receive their wages as should be ordered by the high commissioners and pretended that for any contempt they might fine and imprison.

But upon this return they were bailed until the first *Tuesday* next Term.

(a) See 1. Eliz. c. 1. and 5. vol. account of the powers and authorities of Hume's Hist. Eng. 266. to 379. for an the court of high commission.

## CASE 9.

## John Parker's Case.

An excommunicato capiendo is void by 5. Eliz. c. 23. unless it be returned into the king's bench and delivered of record to the sheriff.

Cro. Jac. 567.

Strange, 1189.

2. Peere Will.

**JOHN PARKER** was brought to the bar by *habeas corpus*; and the cause of his commitment appeared to be, by virtue of a writ *de excommunicato capiendo*, grounded upon the chancellor of *Norwich* certificate into the chancery. It was pleaded, that this *excommunicato capiendo* was void, and that the party was not lawfully imprisoned because by the 5. Eliz. c. 23. the writ ought to have been brought into the king's bench, and to have been inrolled there, and delivered in convenient time to the sheriff.—And ALL THE COURT resolved he was not duly imprisoned; and therefore he was discharged.

53. 1. Salk 293. Tremain, 444.



## The King against Sir John Dryden and Others.

CASE 10.

Ante, Page 574.

THIS Case was now in the end of this Term moved again, that the writ of right of advowson should abate by the death of one of the tenants, although it be admitted that they were jointenants.— Now because neither MASTER ATTORNEY or any other had argued for the king all this Term, ALL THE COURT retained their former opinion, that the writ should abate, and that judgment should be entered accordingly.

In a writ of right of advowson against coparceners or jointenants, the writ shall abate if one of them die *puis darrein continuance*.

See ante, 574. Post. 585.

## Thomas Bensted's Case.

CASE 11.

THOMAS BENSTED, *die Jovis post clausum Termini*, was indicted and arraigned before special commissioners of *oyer et terminer*, in *Southwark*, wherein ALL THE JUSTICES AND BARONS were in commission and present; at which time, upon conference with all the Justices, it was resolved,

FIRST, That going to *Lambeth-house* in warlike manner to surprize the archbishop, who was a privy-counsellor (it being with drums and a multitude, as the indictment was, to the number of three hundred persons), was treason (a).

1. 25. Foster, 209. 211. 1. Hale, 141. Dougl. 210. Rex v. Lord George Gordon, Dougl. 590.

SECONDLY, That the sitting, and enquiry, and trial of the prisoners, all upon one day, by virtue of the commission of *oyer and terminer*, without any commission of gaol-delivery, was good enough, notwithstanding THE YEAR-BOOK of 2. Hen. 8. pl. 159. which was held to be no law.

same day. Ante, 448.—2. Inst. 568. 590. Keilw. 159. Sum. 109. Kely. 77. Ld. Ray. 67.

THIRDLY, It was resolved by ten of the said Justices *seriatim*, that the breaking of a prison wherein traitors are in durance, and causing them to escape, is treason, although the parties did not know that there were any traitors there, upon the case in THE YEAR-BOOK 1. Hen. 6. pl. 5. b.; and so to break a prison whereby felons escape is felony, without knowing (b) them to be imprisoned for such offence.

Breaking prison by which traitors escape, is high-treason.

S. C. Jones, 455. 2. Inst. 590. Stamf. P. C. 32. Foster, 344.

1. Hale, 269. 2. Hawk. P. C. 210. 3. Peere Wms. 469, 470.

(a) This point is not mentioned in the report of the case by Sir William Jones, 455. The cause and circumstances of this tumult are stated to have been, that on the 5th of May 1640 the king suddenly dissolved the parliament, and suffered the convocation still to sit, to the general dissatisfaction of the nation. The blame and odium of both these unpopular measures were laid upon *Land*, the archbishop of Canterbury. On Saturday 9th May 1640 a paper was posted up at the Exchange, inciting the apprentices to rise and sack the archbishop's house on the Monday following; and accordingly on the night of that very day an attack was made upon

archbishop Laud in his palace at Lambeth by above five hundred persons, with open profession and protestation that they would tear the archbishop to pieces. On the Thursday following the special commission was opened and proceeded on. *Bensted*, a ringleader in the tumult, was convicted, and within a very few days afterwards executed. Foster, 212. 6. Hume, 290. 3. Rushw. p. 1167. Whitlock, p. 33. Dugdale, 62. And see Mr. Justice Foster's Observations on this Case, 1. Disc. p. 203. to 212. and 3. Disc. 445.

(b) See *Vide* 2 Hawk. P. C. ch. 18. s. 17.

## Trinity Term,

16. Car. 1. In the King's Bench.

Sir John Brampston, *Knt. Chief Justice.*Sir William Jones, *Knt.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*Sir John Banks, *Knt. Attorney General.*

Solicitor General.

} *Justices.*

## CASE 1.

Twelve Serjeants called.

## Memorandum.

IN the Vacation betwixt *Easter* and *Trinity Terms*, by the nomination of SIR JOHN FINCH, *Knight*, Lord Keeper of the Great Seal, and SIR EDWARD LITTLETON, *Chief Justice* of the Common Pleas, these twelve were appointed to be Serjeants:

## OF THE INNER TEMPLE,

John Stone,  
John Whitwick,  
Henry Rolls;

## OF LINCOLN'S-INN,

Rich. Taylor,  
Ed. Atkins, and  
John Green;

## OF THE MIDDLE TEMPLE,

William Littleton (second brother  
of the said Sir Edward Littleton),  
— Bryerwood,  
Robert Hide;

## OF GRAY'S-INN,

Peter Pheasant,  
Fran. Bacon, and  
Sampson Evers, (the King's  
Attorney in the marches of  
*Wales*, and now made one  
of the King's Serjeants);

all of them then benchers, and having been readers of their respective houses, who had writs delivered them, bearing *teste* 21st *May*, returnable in chancery *Ostavis Trinitatis*, which was *die Lune*: and they appeared in chancery *die Jovis*, being the *quarto die post*, and were sworn, and gave rings, &c.

## CASE 2.

## Leyton's Case.

An indictment for a nuisance to the highway is bad, if it omit the words *vi et armis*.

1. Vent. 108.

2. Lev. 221.

Cro. Jac. 527.

6. Mod. 128.

Yelv. 66.

Stra. 834.

1. Salk. 381.

RICHARD LEYTON was indicted, For that he at S. in the county of *Middlesex*, had erected a barn upon parcel of the highway leading from —, and concluding *ad grave et communum nocumentum omnium ligeorum ac subditorum domini regis per viam predictam euntium transeuntium equitantium, &c.*

And GRIMSTON moved (the words *contra pacem* being omitted) that the indictment might be quashed.

BERKLEY and MYSELF, being only in court, agreed, that for this cause the indictment was ill: and I held, that it ought by the law to be quashed.

2. Hawk. P. C. 345.

The Court will not quash a bad indictment for a nuisance, unless there be a certificate that the nuisance is removed. 1. Vent. 370. Salk. 372. 380. 460. Andrews, 220. 3. Com. Dig. 508. 2. Hawk. P. C. 345. Sayer, 153. 161. Stra. 602. Burr. 1227. 2116. 1. Wils. 325. 1. Ter. Rep. 316.

BUT BERKLEY would not agree thereto, because the usual course is not to quash an indictment for nuisance in an highway without certificate that the nuisance was removed and avoided: and although there were a certificate by many of the inhabitants within the parish and places adjoining, that the barn was not erected upon the highway

highway, nor the highway straitened thereby, yet he would not assent to have the indictment quashed. But I conceived, because the certificate was, that there never was any such nuisance erected, and the indictment being agreed to be vitious, it ought to be quashed for the said error, when it is apparent, &c.; for to traverse and try it is a charge and to no purpose, because the party in an action upon the case cannot recover his damages and costs for falsely and maliciously indicting him, although he be acquitted; especially here when the indictment is totally vitious.

LEYTON'S  
CASE.

Abdy's Case.

CASE 3.

JOHN ABDY, an alderman of London, having an house at —, in the county of Essex, where it was pretended, that constables should be elected out of the inhabitants in every house, by presentment every year in the leet of Sir William Hicks, lord of the said manor and leet; the said Alderman Abdy, by the name of JOHN ABDY, Esquire, was nominated in a leet holden such a day to be constable there for the year following: and because he refused, one John Duke, being steward there, imposed a fine upon him, and denied him his privilege to be freed by reason of his being an alderman.

This being suggested, it was moved to have a writ out of this court, directed to the lord of the said manor or his steward, to discharge him, because he being an alderman of London, ought to be there resident the greatest part of the year; and if absent, is finable.

And ALL THE COURT held, that he ought to be discharged by his privilege; as attornies attending in courts are discharged of such offices of constables and other offices in the parish. And although it was said, he might execute it by deputy, and his personal attendance is not requisite by the custom of the said manor; yet *non allocatur*. Whereupon it was awarded, that a writ should be directed to the lord of the said manor to discharge him.

An alderman of LONDON cannot be elected into the office of constable.  
Ante, 389.  
S C Jones, 462.  
Moor, 845.  
6. Mod. 282.  
1. Pac. Ab. 441.  
4. Pac. Ab. 218.  
2. Bl. Rep. 1126.  
1. Com. Dig. 450.  
Douglas, 538.  
2. Hawk. 100.  
1. Term Rep. 686.  
2. Term Rep. B. R. 4c4.

Sir John Dryden, Margaret Gybbs, and Will. Kingsmill, Plaintiffs, against Thomas Yates and the Bishop of Peterborough.

CASE 4.

Michaëlas Tern, 10. Car. 1. Roll 1433. Ante, Page 583.

QUARE IMPEDIT to present to the church of Middleton-Cheney: wherein the said plaintiffs count, That William Wilks was seised in fee of the advowson of the said church as in gross, and the church being void, presented thereunto one Edward Broome, who was admitted and instituted in the time of queen Elizabeth, and being seised died, which descended to Robert Wilks his son and heir; and being so seised, died seised without issue, which descended to Anne, Frances, and Margaret, as to his sisters and coheirs, whereby they were seised in fee: that Frances took to husband Sir Erasmus Dryden, a baronet, who died seised of that part of the advowson *pro indiviso* with the other two sisters, which descended to Sir John Dryden their son (and so conveys the descents to the other sisters); and that by the death of the said Edward Broome, the last incumbent, it belongs to him to present: and the defendants disturbed them.

The bishop pleaded, that he claims nothing but as ordinary.

The

In *quare impedit*, if the defendant plead a seisin in the crown, and that the king presented A. and deduce title from the crown, a traverse of the presentation to A. without traversing the prior seisin in the crown, is good.  
5. Com. Dig. 114.



SIR JOHN  
DRYDEN and  
OTHERS  
against  
YATES and the  
BISHOP of  
PETERBO-  
ROUGH.

The defendant *Yates* pleaded, that he is parson *imparsonae* of the presentment of the king; and that before the said *William Wilks* had any thing to do in the said advowson, queen *Elizabeth* was seised in fee of the said advowson *jure coronæ*, as of an advowson in gross; and after the death of the said incumbent presented *James Ellis*, who was admitted, instituted, and inducted: that afterwards queen *Elizabeth* died, and the said advowson descended to king *James*, and from him to the king which now is, who presented the defendant.

The plaintiff replies, as in his declaration, that the church being void by the death of *Broome*, they presented, &c.: and TRAVERSES, that *James Ellis* was admitted, instituted, and inducted upon the presentation of queen *Elizabeth*, and so joined issue.

It was found by verdict at the common pleas, that the said *James Ellis* was not admitted, instituted, and inducted upon the presentation of queen *Elizabeth*, as the defendant hath alledged; and that the said church, the last of September 1633, *vacavit per mortem* of *Will. W.*, the last incumbent there, *et valet 200l. per annum ultra reprises*; and that the said church is full of *Thomas Yates* *præsentatione regis hunc: ideo consideratum est quod querentes recuperent præsentationem suam versus ædesendentem; et habeant breve to the bishop of Peterborough, quod non obstante reclamations* of the said *Thomas Yates*, *ac licet* the said *Thomas Yates* was admitted, instituted, and inducted into that church, that he should amove the said *Thomas Yates*, *et idoneam personam ad præsentationem* of the plaintiff's *admittat sine dilatione: et consideratum est*, that the plaintiff's *recuperent versus* the said *Thomas Yates* *damna sua pro valore ecclesiæ pro dimidio anni secundum formam statuti*, which amounted to 100*l.* *et prædictus Thom. Yates in misericordiâ.*

Upon this judgment *Yates* brings a writ of error, and assigns for error,

FIRST, That the plaintiffs in their replication traverse the admission, institution, and induction of *James Ellis* of the presentation of queen *Elizabeth*; and hereupon issue joined and tried, where they ought to have traversed the seisin of queen *Elizabeth*, and not the admission, &c.

THE SECOND ERROR, Because judgment was given for the plaintiff, where it ought to have been for the defendant.

The defendants pleaded, *in nullo est erratum.*

And after divers arguments at the bar it was adjudged, that the traverse was good and well taken, and that the seisin in the queen ought not to have been traversed. Whereupon rule was given, that judgment should be affirmed. *Vide postea*, 589.

L. Raym. 237.  
Ante, 105. a  
174.

#### CASE 5.

#### Thorn against Shering.

Hilary Term, 13. Car. 1. Roll 588.

A traverse upon  
a traverse is bad  
pleading.  
Ante, 105.  
Yelv. 147.  
Cro. Eliz. 463.  
6 Co. 24. a.  
2. Lut. 1630.  
Carth. 166.

TRESPASS *de clauso fræcto*. The defendant justifies his entry by the command of *J. S.* The plaintiff replies, and shews that *J. S.* was seised in fee and let to him at will, and traverseth the command of *J. S.* The defendant maintains, that *J. S.* commanded him to enter, and that he entered by his command, and traverseth the lease at will: and hereupon it being demurred,—IT WAS ADJUDGED for the plaintiff, that the command was traversable; and that the defendant's rejoinder to make a traverse upon a traverse, as this case is, was not good. Wherefore judgment was given for the plaintiff. In Easter Term, 38. Eliz. in *Parker's Case*, adjudged that the command is traversable.

Micl adme

## Michaelmas Term,

16. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*  
 Sir William Jones, *Knt.*  
 Sir George Croke, *Knt.*  
 Sir Robert Berkley, *Knt.*  
 Sir John Banks, *Knt. Attorney General.*  
 Sir Edward Herbert, *Knt. Solicitor General.*

} *Justices.*

George Meade *against* Sir John Lenthall.

CASE 1.

**A**CTION ON THE CASE for disturbing him to execute the office of MARSHAL OF THE KING'S BENCH, granted to him by patent for years (a). Upon not guilty pleaded, and special verdict found, the sole question was, Whether a patent of this office granted for years (which was the plaintiff's title) be good or not?

It was argued by JENKINS and MAYNARD, *for the plaintiff*; and by HEATH and ROLLE, *for the defendant*. And after advisement of the Court until this Term, it was agreed *nullo contradicente*, that judgment should be given for the defendant.

BRAMPSTON, *Chief Justice*, delivered all their opinions to be so, principally for the reasons given in the case of *Sir George Reynolds*, 9. Co. 97<sup>r</sup>: for this being an office of great trust, and attendance continually in court, great inconveniences would ensue if such offices might be granted *for years*, which thereby might come in suspense upon probate of a will, until administration were committed thereof; and it might fall, or be given to persons insufficient, of whom the Court could not conveniently admit. And whereas it was objected, that it may be granted in fee or in tail, &c. and so descend to an infant, &c. and therefore for years; it was answered, that in such case the Court hath used to put in another fit person for the time. And whereas it was objected, that offices of sheriffs were granted for years, until restrained by a statute of 14. *Edw. 3.*; it was answered, that those grants were *de facto*; but it never was debated, what inconvenience might ensue by the granting of such offices in that manner which concern the justice of the kingdom, and which require continual attendance.

An office to which a trust is annexed, or which concerns the administration of justice, cannot be granted for years. Jones, 463.

2. Bul. 58.  
 1. Roll. Ab. 347.  
 2. Roll. Ab. 139.  
 9. Co. 97.  
 4. Com. Dig. 287.  
 Hob. 153.  
 3. Mod. 145.  
 3. Bac. Ab. 302.  
 Dougl. 398.  
 2. Term Rep. 81.

(a) See 27. Geo. 2. c. 17.

Lodge *against* Hollowell.

CASE 2.

Trinity Term, 15. Car. 1.—In the Crown Office.

**I**NFORMATION for the king, the city of London, and the inferior; For that the defendant, being a currier, bought two hides of tanned leather, each of them of the value of sixteen shillings, of persons unknown, and sold them unwrought, and not converted into made wares, to one James Mercer, a shoemaker in London, *contra formam statuti*; whereupon he demands the third part of the said value for the king, the third part for the city of London, and the third part for himself,

If a currier buy hides of leather, and curry and tan them, and sell them unwrought into made wares, he incurs the penalties imposed by 1. Jac. 2.

The c. 22.

LODGE  
against  
HOLLOWELL.

The defendant pleaded not guilty; and the jury find a special verdict, that the defendant being a citizen and inhabitant of *London*, bought the said two hides of persons unknown, and after curried them with oil and tallow and other things necessary, and after shaved and dyed them; and so being wrought, sold them to the said *James Mercer*, a shoemaker in *London*: and, Whether that be a buying and selling (not being otherwise, nor converted into made wares) against the form of the statute? they prayed the discretion, &c.; and found them to be of the same value as in the information, &c.

It was argued at the bar by *ROLLE, Serjeant*, and *MAYNARD*, for the plaintiff; by *MALLET, Serjeant*, and *HOLBORN*, for the defendant; and this Term by ALL THE COURT *seriatim*, because it concerned a multitude of curriers.

See 3 Burn's  
Justice, title  
"LEATHER."

And they all resolved, that it was an offence against the statute of 1. Jac. 1. c. 22. and the value forfeited by the statute; for this selling by a currier, not being cut out and made into wares, is against the letter and meaning of the statute of 5. & 6. Edw. 6. c. 15. 27. Eliz. c. 16. and 1. Jac. 1. c. 22. all which were well weighed and considered; and this information is grounded upon the statute of 1. Jac. 1. c. 22. for it demands the third part, which none of the other statutes gives. And the statute of 5. Edw. 6. c. 15. is perpetual, which expressly forbids all persons to regrate for the buying and selling by wholesale, and all persons who are not artificers, to convert leather into made wares: and this is a perpetual statute, not repealed by any, unless by the 1. Mary, f. 2. which repeals 5. & 6. Edw. 6. c. 15. as made and procured by the shoemakers for their private gains: and the curriers were restrained by the said statute; and therefore the statute of *Mary* repealed the statute of *Edward* the sixth, and allowed curriers to buy and sell leather to artificers who work it into made wares. But this statute of queen *Mary* was repealed by the statute of 1. Eliz. c. 8. which repeals eight several statutes there mentioned concerning leather, and expressly revives the statute of 5. & 6. Edw. 6. c. 15. (because by the repeal thereof leather was dearer, boots and shoes and other wares sold at excessive prices, to the undoing of many) but only as to one clause therein, viz. that shoemakers may sell boots and shoes and other wares at *Calais* (which then in the time of *Edward* the sixth was *Englisch*). But now because that part of the said statute was repealed, it shews that all other parts of the said statute are continued, and especially the statute of 27. Eliz. c. 16. is expressly in the point, that curriers by name shall not buy and sell tanned leather, unless it be wrought and cut out, and converted into made wares now used, or hereafter into made wares; which sheweth currying only is not accounted a converting into made wares. And *BERKLEY* cited *Bracton*, who describes wares to be made by cutting out and sewing, and converting them into another species: and the statute of 1. Jac. 1. c. 22. repeals the statute of 1. Eliz. c. 8. (a); for it hath the same words, "no person or persons, &c. tanned leather, &c. they who convert it into made wares, &c." And although it was objected by *HOLBORN*, that this statute was never in force against curriers, but that currying and dressing hath been accounted made wares by their trades; it was answered, that those statutes being in force and not repealed, the currier was bound thereby and punishable,

(a) Repealed by 5. Eliz. c. 8. as well as by 1. Jac. 1. c. 22. But see the statutes 9. Ann. c. 11. 1. Will. 3. c. 33. f. 4. and 12. Geo. 2. c. 25.



punishable, as it is held in the like case 4. *Edw. 4. pl. 1. and 11. Hen. 4. pl. 38.* Wherefore they all held, that a currier may not sell nor buy by wholesale; but peradventure they may buy and sell in any other manner, not prohibited by any statute, as to coachmakers, joiners, and others, for the making of chairs and stools who used such leather: and great inconvenience would ensue if they should be permitted to buy and sell whole, not cut out, and made into some kind of wares. Wherefore it was adjudged for the plaintiff.

LODGE  
against  
HOLLOWELL.

## Orme against Pemberton.

CASE 3.

THE PLAINTIFF prayed to have a writ granted to revoke Pemberton's election, who was chosen by the parson of *St. Catherine*, in *Coleman-street*, to be clerk of the said parish, whereas the parishioners at their vestry, according to the custom of the parish, had elected the said Orme; and that the Court would direct them to admit the said Orme.—And hereof THE COURT would advise, and appointed that precedents should be searched what hath been done in such cases. In *Trinity Term, 21. Jac. 1.* a prohibition was awarded against a parson and clerk who sued in the spiritual court to be admitted, as elected by the parson, and the other elected in the vestry.

On a custom for parishioners to chuse a parish-clerk, the king's bench will grant a mandamus to the archdeacon to swear him in Ante, 552.  
Cro. Jac. 670.  
1. Bl. Com. 395.  
Cowp. 370.  
2. Term Rep. 177.

## Yates against Sir John Dryden and Others.

CASE 4.

Michaelmas Term, 10. Car. 1. Roll 1473.—In the Common Pleas.

Ante, Page 585.

ERROR of a judgment in the common pleas in a *quare impedit*; If the king where the judgment being upon verdict, Yates brings a writ of error, and hanging the writ of error the king brings a writ of right pending error in *quare impedit*, the proceedings shall stay till trial had.

After verdict one of the tenants died. The question was, Whether thereby the writ should abate?—And after long debating, it was resolved and adjudged, that the writ should abate in all.

In writ of right the suit abates by death of tenant after verdict. Ante, 574.

The Court afterwards proceeded to the examination of the errors: and upon debate adjudged, that it was not erroneous, and gave rule that judgment should be affirmed, unless cause were shewn the first Monday of this Term: and no cause being then shewn, rule was absolutely given, that judgment should be affirmed.

Injunction to stay proceedings after judgment affirmed, nisi, &c. on a writ of error.

3. Kely. 17. Chan. Caf. 448. Gilb. Chan. 194. 2. Harrison's Chan. 223.

In the interim, Yates exhibited a bill in the exchequer chamber against the defendants in the writ of error, and served them; and, upon their answer, obtained an order to stay that suit, that they should not draw up the said judgment, and served all the parties and their counsel therewith; and afterward served the prothonotaries of this court with this injunction, that they should not enter up the judgment which the Court had commanded to be entered up.

The

YATES  
against  
SIR JOHN  
DRYDEN and  
OTHERS.

The Attorney General hereupon exhibited a plea, which was, that *Margaret Gybbs* held that advowson in coparcenary with the other two plaintiffs by knight's service *in capite*, and died seised, which descended to *William Gybbs* her son and heir, of full age, viz. of twenty-seven years; and for want of his suing out livery, it belonged to the king to present; and demanded judgment *si executio*.

THE COURT all held it to be no plea, especially there being no office produced finding the same.

Whenever a clear title appears upon record for the king, the Court shall, *ex officio*, give judgment in his favour.

The Attorney and Solicitor General much insisted, that a title appearing for the king, the Court *ex officio* ought to award for the king; and relied upon 21. *Edw. 3. pl. 30.* 12. *Hen. 7. pl. 12.* that the king should have the right of any coparcener, and *N. B. 38. E.* that where title appears for the king (a), the Court shall award a writ to the bishop for the king.

Hob. 127.  
Moor, 872.  
1. Mod. 27. b.  
Vaugh. 64.  
Hard. 150.

Yet ALL THE COURT held, that here, as it is alledged, there is not any colour of plea, but it ought to be rejected; for it is but matter in fact, especially in this writ of error, the judgment being given in the common pleas, and execution for damages given in the case, and increased here by the statute of 3. *Hen. 7. c. 10.* which is not to be estopped, or the parties to be delayed by such bare surmises, not being grounded upon any matter of record.

The case was afterwards argued at the bar by HOLBORN, for the defendants in the writ of error, and prayed that judgment might be affirmed; for there is no colour for this plea, nor any matter confessed of record by pleading betwixt the parties, that the king hath title to present; for then, true it is, the Court ought to direct a writ to the bishop for the king *ex officio*, at it is in 11. *Hen. 4. by Fitzh. 38.* 12. *Hen. 12. pl. 9.* 9. *Hen. 7. pl. 9.* 19. *Hen. 7. pl. 12. per Fineux*; but when it doth not appear upon the same record, there is not in such case any book which maintains that a writ should be sent to the bishop for the king.

In *quare impedit*, if a special verdict find that A. was not admitted upon the king's presentation, a contrary verdict found in a writ of right for the same church but not between the parties, shall not avoid the verdict in *quare impedit*.

Cro. Jac. 134.  
627.  
Hob. 54.  
4. Mod. 379.

And whereas it was here objected, that the verdict in the writ of right of advowson (being a writ of the highest nature) should control the verdict in the *quare impedit*; for there the verdict is, that the said *James Ellis* was not admitted, instituted, and inducted *ad ecclesiam prædictam ad præsentationem dictæ nuper reginæ Elizabethæ modo et formâ prout* the defendant hath alledged; and the special verdict in the writ of right finds, that the said *James Ellis* was admitted, instituted, and inducted *ad ecclesiam prædictam ex præsentatione dictæ nuper Elizabethæ reginæ*, which being a more high action destroys the former verdict in the *quare impedit*; and therefore the judgment and execution is thereby to be avoided, as BANKS, Attorney General, and HERBERT, Solicitor General, affirmed; HOLBORN answered thereto, Admitting there had been two contrary verdicts, yet the first verdict in the *quare impedit*, and judgment thereupon, ought not to be avoided unless by error or attain. And whereas it was alledged, that where the said verdict in the writ of right of advowson found good title for the king, therefore the Court *ex officio* ought to stay the awarding of entering judgment upon the *quare impedit*, and ought to award a writ to the bishop for the king; he answered, Admitting

(a) See 9 Geo. 3. c. 16.

YATES  
against  
SIR JOHN  
DRYDEN and  
OTHERS.

Ante, 518.

5. Com. Dig.  
176.

there had been a good and absolute title found therein for the king, yet being a collateral record, the Court should have no regard thereto, but ought to proceed in the judgment to the reversal or affirmation thereof in the common pleas, that being their commission, and no other. And he said, as this case now is, there being no general but a special verdict found, so as *non constat* what it is until judgment shall be given in the writ of error, that the said judgment cannot now be given, and therefore it cannot avoid the first judgment in the *quare impedit*, because the writ is abated by the death of one of the parties.

BERKLEY and MYSELF were of this opinion, for we have nothing to do but to reverse or affirm the judgment, especially as this case is, where judgment is given, and damages and costs in the *quare impedit* against the defendants there, and no colour to stay execution thereof, and where damages are increased by this Court, the said judgment being affirmed by the statute of 3. Hen. 7. c. 10. because the writ of error was in delay of execution: and this plea being matter of fact only, and demanding whether there ought to be execution, there being no apparent error assigned to reverse the judgment, it cannot be good. I insisted upon *Holland's Case* (a), where it was agreed, that a writ of error is but a commission to examine errors, and there much doubted what things might be assigned for error; and therefore was of opinion, that judgment being entered, and damages and costs signed, it ought to be affirmed.

But because the Attorney and Solicitor General were earnest to argue for the king, THE COURT gave them liberty to argue if they would, the Solicitor upon Monday 16 November, and the Attorney upon the Monday following. The Attorney said, that he for the king was to argue last, and that none should argue after him; but I doubted thereof.

2u. If counsel  
may reply on  
the Attorney  
General for the  
king.

At the day appointed the Attorney General argued very confidently, that the writ ought to be awarded for the plaintiffs to the bishop in the writ of *quare impedit*; but that the Court *ex officio* ought to award a writ to the bishop for the king: FIRST, Because the verdict in the right of advowson (although it be a special verdict) finds expressly contrary to the verdict in the *quare impedit*; and this being an action of an higher nature ought to be believed; for the verdict in the *quare impedit* finds, that *J. Ellis* was not admitted and instituted upon the presentation of *Queen Elizabeth*; and the verdict in the right of advowson finds, that *Queen Elizabeth*, anno ....., *non habens jus presentandi*, presented the said *J. Ellis*, who was admitted and instituted to the said presentment of the queen, which is expressly contrary to the verdict in the *quare impedit*, and destroys the plaintiff's title, for the queen had gained right against all but him who had the true and very right; and the verdict *quod ad manus nostras*, &c. is better than the other who hath no right. And the cases in 11. Hen. 7. pl. 71. and other Books before cited, were vouched again, that where title appears for the king, the record being in this court, although the writ is abated by death, yet there is a sufficient record to entitle the king, whereof the Court ought to take notice: and he put many

4. Com. Dig.  
463.

3. Com. Dig.  
199.

(a) Michaelmas Term, 40. & 41. Eliz.



YATES  
against  
SIR JOHN  
DRYDEN and  
OTHERS.

cases, where, by reason of outlawry or felony, the Court shall award the parties to be in execution. SECONDLY, he said, Although the grand jury found that the queen had *minus jus habendi præsentationem*, yet forasmuch as the queen presented, she hath gained the possession, the admission, and institution of her clerk, and hath *major jus* than he who hath not any title; and it appears not that the plaintiffs have any title: wherefore he prayed, that a writ might be awarded for the king.

But afterwards ALL THE COURT, *seriatim*, delivered their opinions, That the plea pleaded is merely void, being upon a surmise, and without any record shewn, as 4. Hen. 7. pl. 5. SECONDLY, That the verdict in the writ of right being but a special verdict, it doth not appear (if the writ had not abated by death), whether judgment should have been for the king or for the defendants.

I conceived clearly, judgment ought to have been given for the defendants; for the verdict being, that *Queen Elizabeth non habens jus præsentandi*, yet presented to the advowson as *in suo pleno jure*, as the presentation mentions, it is a void presentment; for the queen was deceived in her presentment, which made it merely void as to the queen, who can do no wrong; and the usurpation is only in the incumbent, who procured himself to be instituted, and he is the wrong-doer, and against him only the *quare impedit* is always brought; and no possession, or rather no right, is gained unto the queen by such presentments by usurpation. But the other Justices doubted of this point.

Ante, 99, 100.  
6. Co. 29. b.

Hob. 127.  
Cro. Jac. 216. But they all resolved, that there ought to be a clear title and right appear for the king, and confessed by the parties in pleading, or otherwise fully apparent; for if not, the Court ought not to award a writ *ex officio* for the king: and as this case is, there is not any clear title appears, for by death the writ of the right of advowson abated, and the verdict of no force; and that there is no such contrariety appears by the verdict; for the second verdict, if it had been in force, is no concluding record, but only an evidence, which may well be contradicted.

But it was resolved by them all, although the verdict had been in force, and had been to the contrary, yet being here by writ of error, which is only to affirm or reverse the judgment given in the common pleas, they all agreed to affirm the judgment, and that there was not any error therein.

In the judgment of the common pleas, there being a writ awarded to the bishop to remove the said *Yates*, that writ ought to be awarded; and neither *Yates* nor any other, who hath pretence of title after the judgment, or pendent the same, can hinder but that the judgment and execution ought to pass.

And for the damages which were given in the common pleas, and for the increase given in this court for the delay of execution (where 700l. damages and costs are given for delay of execution, by the statute 3. Hen. 7. c. 10.), they were well given, and due to the plaintiffs who survived, and the death of one of the plaintiffs doth not alter the case.

3. Co. 26. b.

Whereupon judgment was affirmed, and writ awarded to the bishop.

## Lee's Case.

CASE 5.

THE same day, being Saturday, RICHARD LEE and seven others were brought up on a *habeas corpus* from Colchester. It was returned, that they were committed there to gaol, being anabaptists, with conventicles, and absenting themselves from all parochial churches, and baptising and preaching, being all mechanical persons, viz. taylor, weavers, and such like. And it being proved by their own confessions, that one of their company, of the age of sixty years, utterly disallowed of the administration of the sacraments by the ministers of our church, an indictment thereupon being found at the sessions of the peace holden at Chelmsford for the county of Essex, for their absence from church for a month, and resorting to conventicles, against the 35. Eliz. c. 1. they, being severally arraigned, pleaded NOT GUILTY *modo et formâ*; which being returned, a trial was appointed to be at the bar upon Tuesday the twenty-fourth of November following. The statute was read to them, because they pretended there was not any such statute made against them, or that they knew of any such statute, but only against recusants; and THE COURT advised them to consider thereof, and timely to prevent the penalty which would ensue upon conviction. In the mean time they were appointed to be bailed, and to appear at the said day of trial, and in the interim to be of good behaviour.

Persons committed for absenting themselves from church admitted to bail after the indictment found. See the Toleration Act, 1. Will. & Mary, c. 18.

## Brice's Case.

CASE 6.

BRICE, being committed by the Earl of Denbigh, brought his *habeas corpus*: and it being returned, that he was committed to the gaol of Oxon by the said earl, "to remain there without bail or mainprise until he were delivered by the Justices in eyre," it was ordered that he should be bailed for twelve days, and that in the interim they should amend the return; for the return being general, and no special cause shewn, it was held to be absolutely void; and if the return were not amended, and good cause shewn at the day, it was ordered that he should be absolutely dismissed.

A general warrant, in which no special cause of commitment is shewn, is void.

Ante, 133, 307.

See also 16. Car. 1. c. 10. f. 8. and Lord

Camden's opinion on it, 11. St. Tr. 319. and 2. Hawk. ch. 16. f. 4. and ch. 15. f. 71.

## Derby against Hemming.

CASE 7.

Hilary Term, 15. Car. 1. Roll

ERROR of a judgment in the common pleas in debt upon an obligation of one hundred pounds, conditioned for the payment of 51l. 6s. 8d.

The defendant pleaded, that he paid the foresaid 21l. 6s. 8d. at the day; and so mistook twenty-one pounds for fifty-one pounds.

The plaintiff replies, that he did not pay the said 51l. 6s. 8d. at the day in the condition, *prout* the defendant hath pleaded; *et hoc petit quod, &c. Et defendens similiter*. And upon this verdict judgment was given for the plaintiff.

It was now assigned for error, For that the defendant pleads payment of 21l. 6s. 8d. and the plaintiff saith, *non fecit* the said 51l. 6s. 8d. *et hoc, &c.* so there is not any issue.

THE COURT doubted herein, Whether there might be a *repleader* awarded? But because it was adjudged in the common pleas, no issue being joined, and damages and costs given, it was held there might not be a *repleader*. And it was reversed.

A verdict on an issue misjoined in the very point to be tried, is not aided by the statute of Jeofails.

1. Roll. Ab. 200.  
2. Roll Rep 135.  
Hobart, 113.  
Cro. Jac. 14.  
550. 586.  
2. Lev. 194.  
Sta 641.  
1. Com. Dig. 332.  
5. Com. Dig. 145.

1. Bac. Ab. 104.  
3. Id. Ab 77.  
2. Term Rep 755.

Cowp 824. Lou 1. 623. 1. Term Rep. 141. 2. Term Rep 755.

Pelham

## CASE 8.

## Pelham against Hemming.

Hilary Term, 15. Car. 1. Roll 999.

If the name of a party be right in the record, but wrong in the judgment, the judgment may be amended by the record. Ante, 574. 580.

Cro. Jac. 633.  
1. Roll. Ab. 201.  
1. Vent. 217.  
4. Mod. 371.  
12. Mod. 384.  
2. Stra. 1131.  
1156. 1182.  
Cowp. 407. 481.

**E**RROR of a judgment in the common pleas, in debt upon an obligation of one hundred pounds, conditioned, that if *Henry Hemming*, or *Robert Hemming* the defendant, paid 51l. 6s. 8d. to *Sir Robert Napper* such a day, then it should be void.

The defendant pleads, *solvit ad diem*; and it was found against him, and judgment given for the plaintiff, *quod recuperet debitum et damna, &c.* against the said *Robert*, et *prædictus HENRICUS in misericordia*, where it should have been *Robertus*, for *Henry* was no party to the record.

MAYNARD, for the plaintiff, assigned this *ore tenus* for error.

And ALL THE COURT held, that this entry is but a misprison of the clerk; wherefore it was ruled, that it should be amended, and the judgment affirmed.

Dougl. 114. 1. Term Rep. 782.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

## CASE 9.

## Watkinson and Joan his Wife against Turnor.

In battery against husband and wife, where he pleads not guilty, and she justifies, they ought both to join in the averment.

Ante, 417. 573.

Cro. Jac. 239.  
Cro. Eliz. 883.  
Hob. 126.

**E**RROR of a judgment in the common pleas, in battery against the husband and wife, where the defendant *Watkinson* pleaded generally not guilty, and the husband and wife *quoad* the wounding pleaded *non culp.* and *quoad* the battery the wife pleaded justification; and concludes with an averment, "*et hoc parata est verificare*," where it ought to have been, "*parati sunt verificare*."—And this being assigned for error, *ore tenus*, THE COURT much doubted whether it were good, for the husband ought to have joined with the wife: wherefore they all would advise, and see the precedents in the common pleas in this point.

1. Brownl. 6. Palm. 68. 5. Com. Dig. 195. 3. Term Rep. 627.

## CASE 10.

## Tregose against Wennel.

Michaelmas Term, 15. Car. 1. Roll 226.

Upon a writ of replevin, if the sheriff do not take pledges, the judgment will be erroneous; but on a replevin by *plaint* pledges are not necessary.

Ante, 446.

S. C. Jones, 439.  
Cro. Jac. 414.  
2. Inst. 340.  
3. Mod. 57.  
Manl. 46.

**E**RROR of a judgment in the common pleas, in replevin, brought in the hundred court by *pleint*, and removed into the common pleas by *recordare facias loquelam*.

The error was assigned, Because it doth not appear that pledges were returned upon the *pleint*; and it was much insisted upon at the bar, that this was error, and relied upon *Hussey's Case (a)*.

And ALL THE COURT agreed, according to the said case, that if upon the original writ pledges be not returned (because the writ commands, that if pledges be found, that then, &c. and it is to the king's disadvantage if pledges be not found, as the loss of his fine), it was error; but whether it be so in this case was much doubted, because the sheriff may make replevin without pledges finding: and here the error is of the judgment in the common pleas, and it is no error in them; and peradventure pledges were found and not returned; and it is at the sheriff's peril if he do not take pledges, according to the statute of *Westminster* 2. cap. 2.

(a) 9. Co. 71.



## Memorandum.

CASE 11.

UPON the sixth of *November* this Term, The Lord Keeper of the Great Seal, The Lord Treasurer, The Lord Privy Seal, The Earl of *Arundel* Earl Marshal, The Earl of *Pembroke* Lord Chamberlain, The Lord *Cottington* Chancellor of the Exchequer, and all the Justices of both Benches and Barons of the Exchequer, were assembled in the exchequer-chamber to nominate three persons, of every county throughout *England*, to be presented to the king, that he might prick one of them to be sheriff of every county, which is usually done according to the statutes 9. *Edw.* 2. f. 2. 14. *Edw.* 3. c. 7. 23. *Hen.* 6. c. 8. 21. *Hen.* 8. c. 20. upon the third of *November*, being *Craftino Animarum* (a). But because it was the first day of the parliament, and the lords were to attend upon the king, it was resolved, by the advice and resolution of the major part of the Justices, with whom conference was had in this cause, that it might be well put off to another day; and The Lord Keeper, notwithstanding the statutes, deferred it until this day.

(a) Altered to the morrow of *St. Martin* by 24. *Geo.* 2. c. 48. f. 12.—See ante, 13.

## Sloper against Child.

CASE 12.

Michaelmas Term, 15. Car. 1. Roll 651.

ERROR. The error assigned was, That in the writ of *venire facias* awarded to the sheriff of *Somersetshire* the word *vicecomiti* was omitted; yet the sheriff of *Somersetshire* returned the panel, and his name was indorsed; and after *habeas corpora juratorum*, the jury appearing, the verdict and judgment was for the plaintiff.—And this error being assigned, it was held a clear error: but because upon the roll the writ was awarded "*vicecom. Somersf.*" and the omittance of the sheriff is the fault of the clerk, therefore ALL THE JUSTICES agreed, that it ought to be amended, and that the judgment should be affirmed, unless, &c.

A *venire facias* leaving out "*vicecomiti*" may be amended after verdict by 8 *Hen.* 6. c. 15. Ante, 9. 1. Roll. Ab. 205. Hob. 68. Yeiv. 64. 3. *Eac.* Ab. 274.

## Sir Henry Williams's Case.

CASE 13.

SIR HENRY WILLIAMS prayed a prohibition to the council of the marches of *Wales*, because he was sued there for a legacy above the value of fifty pounds, viz. sixty pounds: and it was answered at the bar, that their instructions were to hold plea of legacies of any sum.—But THE COURT doubted thereof, whether such instruction should be good to warrant their proceedings, because causes testamentary and legacies are suable in the spiritual court, and not elsewhere, notwithstanding their instructions; for they cannot warrant that which is not according to law, and the statute of 34. *Hen.* 8. c. 26. warrants that court.

2d. If a legacy above 50l. can be sued for in the marches of *Wales*? Ante, 531. 558. R. 528.

## Calmady's Case.

CASE 14.

CALMADY prayed a prohibition to the court of requests, For that in an action of *trover* for divers goods, after verdict and judgment in this court, and affirmed in a writ of error, the defendant furnished

Prohibition granted to the court of requests.

CALMADY'S  
CASE.3. Inst. 123.  
Cro. Jac. 335.

furnished matter of equity, and that he was surprised in the trial, and had not his witnesses there, having had two verdicts before against this trial, the question being upon sale by the commissioners upon the statute of bankrupts. Whereupon a prohibition was granted; and THE COURT RESOLVED, that so they would always do, whenever any exhibited bills were after verdict and judgment. In the Case of *Stepney v. Lloyd (a)*, in the common pleas, where dures was pleaded to a bond, and afterwards an attachment issued out of the court of requests against the defendant, it was held to be a good plea, and there resolved, that the court of requests cannot grant an attachment of contempt; and in 37. *Eliz.* it was agreed *per totam Curiam* to be against law, that the court of requests should commit any; and in 40. *Eliz.* in this court, *Austen v. Breerton (b)*, in an action and judgment for the plaintiff, the defendant sued in the court of requests to be relieved, this Court, upon examination, did bail the party, and SIR THOMAS GAWDY was convented before the queen for it; yet notwithstanding, it was held good enough, and *Breerton* was enforced to satisfy the said judgment.

(a) Cro. Eliz. 647.

(b) 3 Leon. 229.

## CASE 15.

## Anonymous.

Qu. If a sequestrator of a rectory in London is within 37. *Hen. 8. c. 12.* Ca. Eq. 192, 193. 2. Inst. 660. Cro. Eliz. 276. Moqr, 912. Noy, 130. Hob. 11. Lit. Rep. 102. Hard. 102. 116. 190. Bunb. 26. 238. 3. Com. Dig 108.

PROHIBITION was prayed, For that one J. S. (who was a curate and sequestrator of the rectory of D. in London, by reason that Mr. Walker, for contumacy and other causes, was suspended from exercising his function there) sued four of the parishioners in the spiritual court for tithes of their houses, and not before the mayor, according to the decree and the statute of 37. *Hen. 8. c. 12. s. 11.* for they ought clearly to sue before the mayor of London, and not in the ecclesiastical court, and therefore divers prohibitions have been granted. But whether in this case it was grantable, the said J. S. being neither parson nor vicar, was the doubt. And it was moved at the bar, that for houses tithes ought not to be paid, unless there be a special custom, as in *Dr. Grant's Case (a)* is clearly resolved; and the statute is introductive of a new law, and thereby is appointed how it shall be ruled, and before what Judges, and what remedy shall be for the party grieved, unless their order be obeyed; and then he may not sue in another place, nor before other Judges than the said statute appoints; and if prohibition should not be admitted for suing, it should be a defrauding of the statute, and would make it of no effect.—Wherefore THE COURT doubted, and would further advise, and gave day to hear counsel on both sides.

(a) 11. Co. 16.

## CASE 16.

## Sir Matthew Mints' Case.

A pardon of all felonies before such a day, with a special clause not to find sureties for good behaviour, precludes the liability of finding such security for misdemeanors committed after the day. Sum. 53. Cro. Eliz. 814. 2. Hawk. P. C. 556.

UPON the fourteenth of November 1640, Sir Matthew Mints ALIAS Ments, Knight of the Bath, was convicted of manslaughter of one Weeks, who was his servant, by beating or correcting of him, whereby he was so bruised that he instantly died, and had his clergy, and his burning in the hand was respited.

and

and now he pleaded his pardon, whereby the burning in the hand for *MINTS' CASE.* the manslaughter, and all other felonies committed by him, *et alia malefacta*, before the eighth of *July* last, were pardoned; and there was a special clause, that he should not find sureties for his good behaviour (a); and the pardon bore date 31st *October* last: and although there were divers misdemeanours committed by him after the said eighth day of *July*, for which he deserved to be bound to the good behaviour, yet he had his pardon allowed, and was discharged from finding sureties, &c.

(a) *Vide* 3. & 6. Will. & Mary, c. 13. Strange, 1203.

### Aspye against —.

CASE 17.

**PROHIBITION** was prayed to be awarded to the Council of the *marches of Wales*, where it was by bill suggested, That a copyholder in fee surrendered into the hands of such a tenant such a tenement, held of the said manor by *the verge*, to the use of the plaintiff; and that *Pembridge*, the steward of the manor, refused to admit him, and there prayed that he might be compelled to admit him: whereunto the defendant pleaded, that the custom of the manor is to surrender into the hands of two tenants, and that the said surrender ought to be done by *the verge*; and this surrender was only by a *knife*, sitting at the table, and into the hands of one tenant only; and that he who made this surrender was dead: and his heir alledging that this surrender was void, desired to be admitted, and was admitted: and that notwithstanding this answer, they proceed to try the custom, which is triable only at the common law.—Whereupon a prohibition was granted.

### Sherman against Lyllly.

CASE 18.

*Hilary Term, 15. Car. 1. Roll 1198.*

**DEBT** upon an obligation of two hundred pounds, conditioned, That whereas *Lyllly* had married such a woman, being a widow, if the defendant should permit his said wife to make a will of her husband's goods, to the value of one hundred pounds, *to be paid* within one year after her decease, that then, &c. The defendant pleaded, that he permitted his said wife to make a will; and thereupon the plaintiff demurred.

**ROLLE, Serjeant**, said, that he ought to have pleaded that he paid accordingly; for otherwise he doth not answer to the condition, but only to one part thereof.

**ALL THE COURT** were of that opinion; for "*to be paid*" is all one with "*and to pay*," otherwise it is an idle thing to permit her to make a will, if he doth not pay; and therefore they all held, that the plea was ill. Wherefore it was adjudged for the plaintiff.

### Burwell against Harwell.

*Hilary Term, 15. Car. 1. Roll 197.*

CASE 19.

**REPLEVIN.** The question upon demurrer was, **FIRST**, Whether the grantee of a rent-charge, by the consuror of a statute, after the statute acknowledged, and after the time of the extent of the statute, averring that the debt, damages, and costs are satisfied, charge, and the same be satisfied, the grantee may distrain; and if the goods be replevied, he may be tried, in replevin, whether satisfied or not. *S. C. Jones, 456.*

CRO. CAR.

Q.9.

may



BURWELL  
against  
HARWELL.

Cro. Eliz. 152.  
4. Co. 67.  
Dyer, 1.

A person who  
claims under a  
conufor by fine  
or other record  
cannot maintain  
a diftreſs with-  
out a *ſcire fa-*  
*cias*.

Co. Lit. 315. b.  
Yelv. 12.  
Moor, 662.

4. Co. 67. b.

may diftrain for the rent and arrears without ſuing a *ſcire facias*?—  
And after argument at the bar on both ſides,

BERKLEY, *Juſtice*, delivered his opinion, that the diftreſs was lawful, without a *ſcire facias*; for he did not meddle with the poſſeſſion, but diftrained for his rent: and he put a difference where a man makes a gift in tail, reſerving a rent, and where a donor grants a rent out of a reverſion; in the one caſe the rent may be docked and barred by recovery againſt tenant in tail; but in the other caſe it cannot be deſtroyed by recovery, but the rent ſhall remain at leaſt as a rent-ſeck, &c.

BRAMPSTON, *Juſtice*, ſaid, Peradventure he might enter and diftrain; for where a man hath *proſus à prendre*, as common for twenty beaſts or twenty loads of ſtöwer every year, if he might not have them until *ſcire facias*, he ſhould be at a great miſchief.

And I was of the ſame opinion, that he might diftrain, if he at his peril will take notice that the extent is determined, and the debt, damages and coſts levied; and he cannot have a *ſcire facias*, becauſe he hath no title by record whereupon to ground a *ſcire facias*.

THE SECOND QUESTION upon the demurrer was, Whether one who claims by the conuſor by fine or other record may maintain a diftreſs without a *ſcire facias ad computandum*, as 38. Edw. 3. pl. 12. 25. Edw. 3. pl. 1. and pl. 37.? And in Michaelmas Term following it was argued

By SHAFTOE, *for the avowant*, that the diftreſs was lawful, and that he might well maintain it, without a *ſcire facias ad computandum*.

And ROLLE, *Serjeant, for the plaintiff*, much inſiſted, that forſo- much as the conuſee comes in by matter of record, that without matter of record he cannot be ouſted by one who claims under the conuſor; and therefore the grantee cannot diftrain without firſt ſuing a *ſcire facias*.

BERKLEY, *Juſtice*, answered, That true it is, none who claims eſtate in land under the conuſor, after the ſtatute acknowledged, can enter or avoid the extent without a *ſcire facias* or *venire facias ad computandum*; wherein, if it appear that he hath taken the profits of the land after the time of the extent ſatiſfied, he ſhall be allowed for them and ſhall answer for the profits ſo tortiouſly taken: but grantee of a rent, after the extent ſatiſfied, may well diftrain; ſo may grantee of a common; for they claim no intereſt in the land, but profits out thereof: wherefore he cannot have a *ſcire facias* or a *venire facias ad computandum*; for he ought not to account with them, and therefore may diftrain or put in his cattle to take the profits, otherwiſe he ſhould be without remedy; for which, &c.

And I was of the ſame opinion; and that the rule holds not always good, that where one comes in by matter of record, he ought not to be ouſted without a *ſcire facias* or matter of record: for he whoſe lands are extended upon an *elegit* upon a recognizance, after the debt is ſatiſfied, may enter without *ſcire facias*; but the conuſee of a ſtatute (becauſe he is to have coſts or damages, which are not known) cannot be ouſted without a *ſcire facias*: wherefore, &c.

And, the other Juſtices being *abſent*, rule was given, that judgment ſhould be entered for the avowant, unleſs, &c.

— against Stringer.

CASE 20.

Hilary Term, 15. Car. 1. Roll 2.

TRESPASS for breaking his close in *Culham*, &c. The defendant pleads, as to the breaking of parcel thereof in *Culham*, containing forty-two acres, that *Sir John Prisot* and his wife were seised of the manor of *Culham*, and of the said forty-two acres, parcel of the said manor, and of a messuage and two yard-lands, parcel of the said manor, in right of his wife for her life, remainder over to *J. S.*; and that they joined in a fine *sur consance de droit come ceo*, &c. of the said messuage and two yard-lands to the defendant, and granted them to the defendant and his heirs; and further by the said fine granted to him common for four horses and five beasts, and two hundred sheep in the said manor and lands in *Culham*; and avers the life of the said husband, and that he put in his cattle to use the common, &c. AND as to his breaking the other part of the close he pleads and shews a lease for ninety-nine years.

Upon these pleas the plaintiff demurred; and it was shewn for cause, That the first plea is not good, because he doth not plead that it was waste or common, &c. otherwise he might not claim common, unless in land commonable.

BERKLEY, *Justice*, and MYSELF held, that it was no cause of exception; but by the plea, as the fine is, he may claim common in any part of the manor; for there is not any restraint to the wastes or commons, but it is granted generally in his manor, and not like to the case in THE YEAR-BOOK 9. *Hen. 6.* grant of common *ubique et quodocunque averia sua ierint*, for there he ought to aver that the cattle of the grantor went in the same place.

BERKLEY said, the clause of *quodocunque averia sua ierint* is void, because it restrains all the effect of the grant; for if the grantor will not put in his cattle, he never shall have his common.

I held the said restraint to be good, for he shall not have it but when the grantor hath cattle there; and he is not totally restrained: *modus et conventio vincunt legem*; for it is not intendable that the grantor would totally forbear to put in his cattle to defraud the commoner of his common.

But for the principal point WE BOTH AGREED, *cateris Justitiariis sentibus*, to give judgment for the defendant, that that part of the plea was good.

But for the other part, wherein the lessee prescribes to have common, it is clearly ill. Wherefore it was adjudged for the plaintiff, that this plea was not good.

but he must plead the *que estote*. Latch. 161. 1. Sid. 313. Lutw. 1359. 5. Com. Dig. 336. 169.

A grant of common within the manor of *A.* is good, although it does not appear that there are wastes within the place where common is granted.

Co. Lit. 122. a.  
1. Roll. Ab. 399.  
403.  
Cro. Jac. 27.  
2. Mod. 185.

A lessee for years cannot prescribe for a right of common.

## Hilary Term,

16. Car. 1. In the King's Bench.

Sir John Brampton, *Knt. Chief Justice.*Sir George Croke, *Knt.*Sir Robert Berkley, *Knt.*Sir Robert Heath, *Knt.*Sir John Banks, *Knt. Attorney General.*Sir Edward Herbert, *Knt. Solicitor General.*} *Justices.*

## CASE I.

## Memorandum.

Heath, & succeeds to the king's bench upon the death of Sir W. Jones.

SIR WILLIAM JONES, *Knight*, one of the Justices of the king's bench, died at his house in *Holborn* upon the ninth of *December*, and, according to his own appointment, was buried in the walks under *Lincoln's-Inn* chapel. SIR ROBERT HEATH, one of the King's Serjeants, was appointed to be Justice of the King's Bench in his place. And upon the first *Tuesday* in Term, the said SIR ROBERT HEATH was sworn Justice of the King's Bench.

## CASE 2.

## Memorandum.

The promotions of Littleton, C. J. Banks, A. G. Mr. Herbert, and Mr. St. John.

THE first day of this Term, being *Saturday*, SIR EDWARD LITTLETON, *Knight*, who was Chief Justice of the common pleas, was designed and appointed to be Lord Keeper of the Great Seal; and (having had the seal delivered to him by the king, at *Whitehall*, the *Wednesday* before, and sworn there the same day to be Lord Keeper thereof by the Lord Treasurer and the *Earl of Pembroke*, Lord Chamberlain) signed divers writs in the interim betwixt that and the Term.

If the Chief Justice of C. B. be made Lord Keeper of the Great Seal, still he continues Chief Justice. A. 12. 138. 1. Sid. 333. 1. Hen. 7. pl. 10. b.

SIR JOHN BANKS, *Attorney General*, was designed by the king to be Chief Justice of the common pleas; and divers Lords and others accompanied him to *Westminster*: and all the Justices and Barons, and Master of the Rolls attended the said Lord Keeper to *Westminster*, and yet notwithstanding he continued Chief Justice of the common pleas; and upon *Wednesday*, *quindena Hilarii*, the said Lord Keeper sat in the common pleas as Chief Justice there, not in his robes, but in his long gown and hat, as the Lord Keeper useth to sit, and wore a philizer there, which office he gave as Chief Justice of the common pleas, and afterwards went into chancery.

And then SIR JOHN BANKS appeared before him, by virtue of a writ returned to him, to take the degree of a serjeant at law: and after a speech made to him by the Lord Keeper, and his answer of humble thanks to the king for his grace and favour, he was sworn Serjeant; and after went into the king's bench, and made a motion within the bar as king's attorney; and the next day, being *Thursday*, he performed his ceremonies in *Serjeants-Inn-Hall*, in *Fleet-street*, and went to *Westminster* in his party-coloured robes, with the Warden of the *Fleet*, and other officers attending upon him, and kept his feast in *Serjeants-Inn-Hall*; and the next day, being *Friday*, he was sworn Chief Justice of the common pleas.

And afterwards, the same day, HERBERT, the King's Solicitor, was made Attorney General, and MR. ST. JOHN, of *Lincoln's-Inn*, was made the King's Solicitor.

Chambers



Chambers *against* Sir Edward Brumfeild, late Mayor of London. CASE 3.

TRESPASS of false imprisonment for committing the plaintiff to the prison at *Newgate*. The writ to levy ship-money declared illegal, Ante, 584.

The defendant justifies by virtue of the king's writ, dated 4th August, 11. Car. 1. for not paying of money assessed upon him to-ware's finding of a ship.

Being argued at the bar this Term, it was now moved to have judgment without any further argument, because it had been voted and resolved in the upper house and the house of commons, *nullo contradicente*, that the said writ, and what was done by colour thereof, was illegal.

The Court therefore would no further dispute thereof, but gave judgment for the plaintiff.

## Lord Grey's Case.

CASE 4.

IN this parliament a question was moved concerning the barony of *Rutben*. A baron by writ being created an earl to him and the heirs male of his body has issue two sons by several venters, the eldest of whom had issue a daughter; the barony shall go to the daughter, and the earldom to the second son.

The case was, That one being created a baron to him and his heirs, hath issue a son and a daughter by one *venter*, and a second son by another *venter*, and the eldest son hath the barony, and sits in parliament, and afterwards dies without issue.

The question was, Whether the second son shall have that dignity as heir to his father, or the sister shall have it as *possessio fratris* in lands, &c. and they desired to have the opinion of the Judges therein.

And all the Justices resolved, that there is not any *possessio fratris* of a dignity, but it shall descend to the son; for the younger son is *heres natus*, and the sister is only *heres facta*, by the possession of her brother, of such things as are in *demesne*, but not of dignities and such like, whereof there cannot be an acquisition of the possession, according to *Co. Lit. 15. b.* and *3. Co. 42. a. Ratcliff's Case*.

grave's *Co. Lit.* note (3), p. 15. b. where this case is differently reported and explained. *Claims of Honour*, 255, 272. *Selden's Works*, 3d vol. 1713. and *3. Com. Dig.* 63.

3. Co. 42.  
W. Jones, 16.  
See Hal. MSS.  
in Mr. Har-  
See also Collier's

Gertrude Bacon *against* James Bacon and Three Others. CASE 3.

Trinity Term, 16. Car. 1. Roll 456.

TRESPASS for breaking his close in *Cramford*. Upon not guilty pleaded, a special verdict was found, That *Thomas Bacon*, late of *Cramford* aforesaid, was seised in fee of the tenements in the declaration mentioned, and had issue *John* and *Thomas*; and 15th October 1610 died so seised, which descended to the said *John*; who, being a merchant, went beyond seas to *Elvin*, in *Prussia*, which is in the dominions of the king of *Poland*, to merchandize, and used the trade of a merchant there; and during his trading espoused there *Elizabeth* the daughter of *Francis Cockley*, an *Englishman*, who exercised the trade of a merchant in *partibus transmarinis*: and that 31st August 1615 the said *John Bacon* died, the said *Elizabeth* his wife being *grossment enfeint* with the said *Gertrude*,

Children born abroad of English parents are considered as natural-born subjects; and the daughter of an Englishman, though born abroad, may be an English parent.

Vaugh. 279.  
7. Co. 18.  
1. Sid. 198.  
1. Bac. Abr. 77.

March. 150. *Lit. Rep.* 26. 1. Vent. 413, 427. *Cro. Eliz.* 3. 1. Com. Dig. 297.

now

BACON  
against  
BACON, and  
THREE  
OTHERS.

See the Case of  
Durore v. Jones,  
4. Term Rep.  
300.

now the plaintiff, which *Gertrude* was born the 31st October 1615, at *Elwin* aforesaid; and that the said *Thomas Bacon* was brother of the whole blood to the said *John*; and that the plaintiff is the sole daughter and issue of the said *John*; and that she, the plaintiff, entered into the said tenements, and was seised *prout lex postulat*; and the said *James*, as son and heir of the said *Thomas Bacon*, entered and ousted her, and continued the possession, *prout* in the declaration. *Et si super totam materiam, &c.* the Court shall adjudge for the plaintiff, they find for the plaintiff, and assess damages twelve shillings and costs; and if, &c.

Cre. Jac. 3.

7. Co. 18. a.

Co. Lit. 8. a.  
Mr. Hargrave's  
note (1), and  
128. b.

BRAMPSTON, BERKLEY, and MYSELF, after this had been argued at the bar, agreed, that judgment should be given for the plaintiff; for her father being an *English merchant*, and living beyond the seas for merchandizing, his daughter is born a denizen, and shall be heir to him: and it is not material although his wife be an alien, for she is, as BERKLEY said, *sub potestate viri*, and *quasi* under the allegiance of our king. And, as BRAMPSTON said, although the civil law is, that *partus sequitur ventrem*, yet it is not so in our law; but the child shall be of the father's condition: and he being an *English merchant*, and residing there for merchandizing, his children shall, by the common law, or rather, as BERKLEY said, by the statute of 25. *Edw.* 3. ft. 2. (a) be accounted the king's lieges, as their father is. And they all agreed the sooner in this opinion, by reason of a case vouched to be adjudged 2. *Car.* 1. which I remember was argued in the duchy court before HOBART and YELVERTON, *Justices*, assisting there; where one *Stephens*, being a merchant, went over the seas and resided for his merchandizing, and there had children, they resolved, by the advice of the other *Justices*, that those children were denizens; and it is entered there accordingly. And so in this case it was agreed, and judgment was given for the plaintiff.

(a) S.c 7. Ann. c. 5. 4. Geo. 2. c. 21. and 13. Geo. 3. c. 21.

#### CASE 6.

#### Prinfor's Case.

An arrest cannot be made on a Sunday upon process for good behaviour.

Ante, 395.

10. Co. 76. b.

Rayn. 250.

5. Mod. 449.

2. Salk. 672.

1. Mod. 56.

3. Bac. Ab. 39.

1. Term Rep.

265.

3. Term Rep.

739.

An officer is justified under process of the sessions, although it be irregularly issued. Ante, 395 — 10. Co. 76. 2. Roll. Abr. 560. 1. Vent. 220. 273. Lurw. 1563. 3 Com. Dig. 490.

EDWARD PRINSOR, constable of *Offenham*, was brought into court upon an attachment of contempt; where it appeared by his examination, that he had arrested one *Anthony Haslewood, Esq.* in the church-yard, upon a Sunday, as he came from divine service, by a process for the good behaviour (a), out of the sessions, when the said *Anthony Haslewood* shewed him, that he had a *certiorari* out of this court. But he, pretending that he could not read, arrested and detained him, until he went to another house, and procured it to be read to the said *Prinfor*, who then discharged him.

And for this contempt, because he was arrested upon a Sunday, immediately after divine service, whereas he might have arrested him upon any day of the week, the said *Prinfor* was fined twenty shillings: and for arresting and detaining him after the writ of *certiorari* shewn (his ignorance not excusing him), he was ordered to be bound with sureties to the good behaviour.

But the fine and imprisonment were discharged, because the arrest was by process of the sessions of peace, although the Court declared, it was not well awarded according to the statute of 1. *Jac.* 1. c.

1563. 3 Com. Dig. 490.

(a) See 29. Car. 2. c. 7.

Kings

## Kings against Hilton and his Wife.

CASE 7.

Trinity Term, 16. Car. 1. Roll

**D**EBT against husband and wife, administratrix of her former husband, in which judgment was given against them.

Upon a *feri facias* awarded, the sheriff returned *nulla bona*, &c. of the intestate. Hereupon another *feri facias* was awarded against the husband and wife, with a clause in the writ, that if it be found, that the said husband and wife *devastaverunt bona et si constare poterit, tunc feri facias (a)*. And the sheriff returned, that they had not in their hands any of the goods of the intestate; but that the wife, being administratrix to her first husband, had goods of the value of one hundred pounds of the said intestate, and had wasted them during her widowhood (b), and the husband had not wasted any of them; *et si devastaverunt* according to the writ, the jury prayed the discretion of the Court.

ROLLE, Serjeant, argued, for the plaintiff, that it was a devastation in both.

And THE COURT held, that the sheriff's return of the inquisition finding this matter was good enough. Wherefore it was adjudged for the plaintiff. 1. Sid. 337.

(a) See Petifer's Case, 5. Co. 32.

(b) See 30. Car. 2. c. 7. 3. Mod. 113.

If a man marry an administratrix to a former husband, who has wasted the assets during her widowhood, he shall be liable to the debts of the intestate; for it shall be considered a *devastavit* in him.

Ante, 519.

1. Roll. Ab. 931.

1. Lutw. 672.

Moor, 761.

1 Com. Dig.

256. 565.

## Ball against Trelawny.

CASE 8.

Easter Term, 16. Car. 1. Roll

**B**ILL against the defendant in *custodiâ mareschalli*, upon the 2. Hen. 4. c. 11. (a) for suing in the admiralty court upon a contract made on the land at New England, and not *super altum mare*; where the defendant had obtained judgment in the admiralty court, and taken the party in execution for 112l.; and a verdict was here found for the plaintiff.

HALES moved in arrest of judgment, FIRST, For that the suit is by bill, and not by original writ, as the statute 18. Eliz. c. 5. appoints.—But in regard it was returned that he was in *custodiâ mareschalli*, and he could not otherwise have his remedy, it was held to be well enough.

SECONDLY, For that, being at New-England, it was not alledged to be in *partibus transmarinis*.

And the Court, viz. BRAMPSTON, BERKLEY, HEATH, and MYSELF held, that it is out of the admiral's jurisdiction, and that he hath no authority to meddle therewith. Wherefore it was adjudged for the plaintiff.

The Friday following he appeared upon an *habeas corpus*; and this cause being returned, and that he was in execution for this cause only (which they held to be *coram non judice*), the party was discharged.

(a) See also 13. Rich. 2. c. 5.

An action for suing in the ADMIRALTY where the cause arises upon land may be brought by bill, notwithstanding the 18. Eliz. c. 5.; but it must be stated in *partibus transmarinis*.

Ante, 296.

1. Roll. Ab 537.

4 Inst. 134.

Hob 11.

Strange, 1045.

1. Com. Dig.

228.



*Die Martis 12<sup>o</sup> Novembris 1667.*

Report of the  
Committee  
concerning  
Freedom of  
Speech in  
parliament.

**U**PON a report made by *Mr. Vaughan* from the Committee concerning Freedom of Speech in Parliament,

RESOLVED, &c.

**T**HAT the House do agree with the Committee, that the act of parliament in 4. *Hen. 8. c. 8.* commonly intituled, "An act concerning *Richard Stroud*," is a general law (a), extending to indemnify all and every the members of both houses of parliament, in all parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and necessary rights and privileges of parliament (b).

*Pryn's Anim.*  
12.

(a) See Rushworth, p. 662. where in the 5. *Car. 1.* this statute was resolved by all the Judges to be a particular law: but by 13. *Car. 2. c. 1.* it is provided, that nothing in the said act shall extend to deprive either House of Parliament, or the Members thereof, of their just and ancient privilege of debating any matters propounded in either House, or at any

conference or Committee, or touching the repeal or alteration of any old, or proposing any new law, or redressing any public grievance; but Members shall have the same Freedom and Privilege of Speech as before.

(b) By 1. *Will. & Mary, ft. 2. c. 2.* it is declared to be one of the liberties of the people. See 1. *Bl. Com.* 164.

*Die Sabbati 23<sup>o</sup> Novembris 1667.*

RESOLVED, &c.

*Ante, 182.*  
*6. Hume Hist.*  
*215, 216.*

**T**HAT the judgment given 5. *Car. 1.* against *Sir John Elliot, Denzel Hollis* and *Benjamin Valentine*, in the king's bench is an illegal judgment, and against the freedom and privilege of parliament.

*Die Sabbati 7<sup>o</sup> Decembris 1667.*

RESOLVED, &c.

**T**HAT the concurrence of the Lords be desired to the votes of this House concerning Freedom of Speech in parliament, and that a conference be on *Monday* next desired to be had with the Lords, at which time the votes may be delivered, and reasons for them given.

*Die Jovis 12<sup>o</sup> Decembris 1667.*

**A** MESSAGE from the Lords by *Sir William Childs* and *Sir Thomas Esfcourt*.

MR. SPEAKER,

*4. Com. Dig.*  
*347.*

**T**HE Lords have commanded us to acquaint you, that they agree with this House in the votes delivered them at the last conference concerning Freedom of Speech in parliament.

*Die Mercurii 11<sup>o</sup> Decembris 1667.*

NEXT the Lord Chamberlain and Lord Ashley reported the effect of the conference with the house of commons yesterday, which was managed by Mr. Vaughan, who said, he was commanded by the house of commons to acquaint their lordships with some resolves of their house concerning the freedom of speech in parliament, and to desire their lordships' concurrence therein.

In order to which he was to acquaint their lordships with the reasons that induced the house of commons to pass those resolves.

He said, the house of commons was accidentally informed of certain books published under the name of SIR GEORGE CROKE'S REPORTS, in one of which there was a case published which did very much concern this great privilege of parliament, and which, passing from hand to hand amongst the men of the long robe, might come in time to be a received opinion as good law.

The house of commons, considering the consequence, did take care that this case might be inquired into, and caused the book to be produced and read in their house; and he thought the next and clearest way to inform their lordships was to read the case itself, which is *quinto Caroli primi Michaelmas Term*, which case was read as followeth:

"The King against Sir John Elliot, Denzel Hollis, and Benjamin Valentine.

"AN INFORMATION was exhibited against them by the Attorney General, reciting, That a parliament was summoned to be held at *Westminster 17. Martii, 3. Caroli regis ibidem inchoat.* and that Sir John Elliot was duly elected and returned knight for the county of Cornwall, and the other two burgesses of parliament for other places; and Sir John Finch chosen speaker: that Sir John Elliot, *machinans et intendens omnibus viis et modis seminare et excitare discord, evil will, murmurings, and seditions, as well versus regem, magnates, prelatos, proceres, et justiciarios, et reliquos subiectos regis, et totaliter deprivare et subvertere regimen et gubernationem regni ANGLIÆ, tam in domino rege quàm in conciliariis et ministris suis cujuscunque generis, et introducere tumultum et confusionem in all estates and parts, et ad intentionem that all the king's subjects should withdraw their affections from the king, the 23<sup>d</sup> of February, anno Car. I. in the parliament and hearing of the commons, falso, malitiosè, et seditiosè used these words, "The king's privy council,*

\* Q 1

"his

CRO. CAR.

“ his judges, and his counsel learned, have conspired together to  
 “ trample under their feet the liberties of the subjects of this realm,  
 “ and the liberties of this house.”

“ And afterwards, upon the second of *March*, anno 4. aforesaid, the king appointed the parliament to be adjourned until the tenth of *March* next following, and so signified his pleasure to the house of commons; and that the three defendants, the said second day of *March*, 4. *Car. 1. malitiosè* agreed, and amongst themselves conspired to disturb and distract the commons, that they should not adjourn themselves according to the king's pleasure before signified; and that the said *Sir John Elliot*, according to the agreement and conspiracy aforesaid, had maliciously *in propositum et intentionem prædictam*, in the house of commons aforesaid, spoken these false, pernicious, and seditious words precedent, &c. and that the said *Denzel Hollis*, according to the agreement and conspiracy aforesaid between him and the other defendants, then and there *falsè, malitiosè, et seditiosè*, uttered *hæc falsa, malitiosa, et scandalosa verba præcedentia*, &c. and that the said *Denzel Hollis* and *Benjamin Valentine*, *secundum agreementum et conspirationem prædictæ. &c. ad intentionem et propositum prædictæ*, uttered the said words upon the said second day of *March*, after the signifying the king's pleasure to adjourn; and when the said *Sir John Finch*, the Speaker, endeavoured to get out of the chair, according to the king's command, they *vi et armis manu forti et illicito* assaulted, evil-intreated, and forcibly detained him in the chair; and afterwards, being out of the chair, they assaulted him in the house, and evil-intreated him, *et violenter manu forti et illicito* drew him to the chair, and thrust him into it: whereupon there was great tumult and commotion in the house, to the great terror of the commons there assembled, against their allegiance, *in maximum contemptum* and to the dishonour of the king, his crown, and dignity, for which, &c. To this information the defendants appearing, pleaded to the jurisdiction of this court, that the Court ought not to have consufance thereof, because it is for offences done in parliament, and ought to be there examined and punished, and not elsewhere. It was thereupon demurred, and after argument adjudged, that they ought to answer, for the charge is for conspiracy, seditious acts and practices, to stop the adjournment of the parliament, which may be examined out of parliament, being seditious and unlawful acts, and this court may take consufance and punish them. Afterwards divers rules being given against them, viz. *Sir John Elliot*, that he should be committed to the *Tower*, and should pay two thousand pounds fine, and upon his enlargement should find sureties for his good behaviour; and against *Hollis*, that he should pay a thousand marks, and should be imprisoned, and find sureties, &c. and against *Valentine*, that he should pay five hundred pounds fine, be imprisoned, and find sureties.”

Then MR. VAUGHAN laid much emphasis upon the word “*machinans et intendens*, &c.” and then went on, “ That the house of commons had not only read the case as it was in the book, but did look into the record, where in the information itself they found  
 some



some considerable differences from the print; as that the crime alleged consisting partly of words spoken in the house, partly of criminal actions pretended to be committed, the gentlemen accused pleaded severally, namely, specially to the words, and a several plea apart to the criminal actions; but the Court dealt so craftily that they over-ruled the whole plea, mingled together, and took it in general, so that perhaps whatsoever was criminal in the actions might serve for a justification of their rule, and might make it seem in time to become a precedent, and a ruled case against the liberty of speech in parliament, which they durst not singly and barefaced have done.

"The house of commons did take care to inquire what ancient laws did fortify this the greatest privilege of both houses, and they found, in the fourth year of HENRY THE EIGHTH, an act concerning one *Richard Strowd*, who was a member of parliament, and was fined at the stannary courts in the west for condescending and agreeing with other members of the house to pass certain acts to the prejudice of the stannaries. This act was made occasionally for him, but did reach to every member of parliament that then was or shall be, the very words being, viz. "And over that, BE IT ENACTED by the same authority, That all suits, accusements, condemnations, executions, fines, amercements, punishments, corrections, grievances, charges, and impositions, put or had, or hereafter to be put or had unto or upon the said *Richard*, and to every other of the person or persons afore specified, that now be of this present parliament, or that of any parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the parliament to be commenced and treated of, be utterly void, and of none effect. And over that BE IT ENACTED by the said authority, That if the said *Richard Strowd*, or any of all the said other person or persons, hereafter be vexed, troubled, or otherwise charged for any causes as is aforesaid, that then he or they, and every of them, so vexed or troubled of or for the same, to have action upon the case against every such person or persons so vexing or troubling any contrary to this ordinance and provision, in the which action the party grieved shall recover treble damages and costs, and that no protection, essoign, nor wager of law in the said action, in any wise be admitted nor received."

He said, "It is very possible the plea of those worthy persons, *Denzel Hollis*, *Sir John Elliot*, and the rest, was not sufficient to the jurisdiction of the court, if you take in their criminal actions altogether; but as to the words spoken in parliament, the Court could have no jurisdiction while this act of 4. *Hen. 8.* is in force, which extends to all members that then were (or ever should be) as well as *Strowd*, and was a public general law, though made upon a private and a particular occasion.

He recommended to their lordships the consideration of the time when these words in the case of *SIR GEORGE CROKE'S*  
REPORTS

REPORTS were spoken, which was the second of *March, 4. Caroli primi*, being in that parliament which began in the precedent *March, 3. Carol.* at which time the judgment given in the king's bench about *habeas corpus* was newly reversed, which concerned the freedom of our persons, the liberty of speech invaded in this case; and not long after the same Judges (with some others) joined with them in the cases of ship-money, invaded the propriety of our goods and estates; so that their lordships find every part of these words, for which those worthy persons were accused, justified.

If any man should speak against any of the great officers, as the chancellor or treasurer, or any of the rest recited in those acts, as by accusing them of corruption, ill counsel, or the like, he might possibly justify himself by proving of it; but in this case it was impossible to do it, because those judgments had preceded and concluded him, for he could make none but by alledging their own judgments which they themselves had resolved, and would not therefore allow to be crimes which they had made for laws.

He did inform their lordships, that the bill in the rolls hath another title than that he did mention, this being That that the clerks knew it by, rather than the proper title.

The words in the case are charged *ea intentione*, which ought not to be; for it is clear and undoubted law, that whatever is in itself lawful cannot have an unlawful intent annexed to it. Things unlawful may be made an higher crime by the illness of the intent: for instance, taking away my horse is a trespass only, but intending to steal him makes it felony: borrowing my horse, though intending to steal him, is not felony, because borrowing is lawful. And there were no use of freedom of speech otherwise, for a depraved intention may be annexed to any the most justifiable action. If a man eat no flesh, he may be accused for the depraved intention of bringing in the *Pythagorean* religion and subverting the *Christian*. If a man drink water, he may be accused of the depraved intention of subverting the king's government, by destroying his revenue both of excise and customs.

No man can make a doubt but whatsoever is once enacted is lawful: but nothing can come into an act of parliament but it must be first offered or propounded by somebody; so that if the act can wrong nobody, no more can the first propounding; the members must be as free as the houses. An act of parliament cannot disturb the State, therefore the debate that tends to it cannot, for it must be propounded and debated before it can be enacted.

In the reign of *Henry* the eighth, when there were so many persons taken by act of parliament out of the lords house, as the abbots and priors, and all the religious houses and lands taken away, it  
had

had been a strange information against any member of parliament then for propounding so great an alteration in church and state.

Besides, religion itself began then to be altered, and was perfected in the beginning of *Edward* the sixth's reign, and returned again to popery in the beginning of queen *Mary's*; and the protestant religion restored again in the beginning of queen *Elizabeth's*.

Should a member of parliament in any of these times have been justly informed against in the king's bench for propounding or debating any of these alterations? so that their lordships perceive the reasons and inducements the house of commons had to pass these votes now presented to their lordships.

After these votes were read, *viz.*

RESOLVED, &c.

THAT the act of parliament 4. *Hen.* 8. commonly intituled, "An Act concerning *Richard Stroud*," is a general law, extending to indemnify all and every the members of both houses of parliament, in all parliaments, for the touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and necessary rights and privileges of parliament.

RESOLVED, &c.

THAT the judgment given 5. *Car.* 1. against *Sir John Elliot*, *Denzel Holles*, and *Benjamin Valentine*, esquires, in the king's bench, was an illegal judgment, and against the freedom and privilege of parliament.

To both which votes the lords agree with the house of commons.

UPON consideration had this day of a judgment given in the court of king's bench in *Michaelmas* Term, in the fifth year of king *Charles* the first, against *Sir John Elliot*, knight, *Denzel Holles*, and *Benjamin Valentine*, esquires, which judgment is found to be erroneous; it is ordered, by the lords spiritual and temporal in parliament assembled, That the said *Denzel Holles*, esquire (now LORD HOLLES, *Baron of Ifield*), be desired to cause the roll of the court of the king's bench wherein the said judgment is recorded, to be brought before the lords in parliament by a writ of error, to send that such further judgment may be given upon the said case as the house shall find meet.

MESSAGE was sent to the house of commons by *Sir William Childe* and *Sir Justinian Lewin*, to acquaint them, that the lords do agree to those votes which were delivered at the conference yesterday.

R r

Dis



Die Mercurii 15<sup>o</sup> April 1668.

**W**HEREAS counfel have been this day heard at the bar, as well to argue the errors assigned by LORD HOLLES, *Baron of Ifeild*, upon a writ of error depending in this house, brought against a judgment given in the court of king's in 5. *Car. 1.* against the said LORD HOLLES, by the name of *Denzel Holles*, esquire, and others; as also to maintain and defend the said judgment on his majesty's behalf: upon due consideration had of what had been offered on both parts thereupon, the lords spiritual and temporal in parliament do order and adjudge, That the said judgment given in the court of king's bench in 5. *Car. 1.* against the said *Denzel Holles* and others, shall be reversed.

The form whereof (to be affixed to the transcript of the record) followeth:

*ET* quia curia parliamenti de iudicio suo de et super præmissis reddend' nondum advisatur, dies datus est tam prædict'. GALFRIDO PALMER, militi et baronet. qui sequitur, &c. quam prædict'. DENZEL domino HOLLES coram eadem curiâ usque ad diem MERCURII decimum quintum diem APRILIS tunc proximum sequentem apud WESTMONAST. in comitat. MIDD. de iudicio suo inde audiend. eò quòd curia prædict. nondum, &c. Ad quem diem coram curiâ prædict. venit tam prædict'. GALFRIDUS PALMER qui sequitur, &c. quam prædictus DENZEL dominus HOLLES in propriis personis suis. Super quo, visis, et per eandem curiam nunc hic plenius intellectis omnibus et singulis præmissis, maturâque deliberatione inde habitâ, consideratum est per curiam prædictam, quòd iudicium prædict. ob errores prædictos et alios in recordo et processu prædictis compertos revocetur, adnulletur, et penitus pro nullo habeatur; et quòd prædict. DENZEL dominus HOLLES omnia quæ idem DENZEL dominus HOLLES occasione iudicii prædicti amisit, restituatur.

JO. BROWNE, Cleric. Parliamentorum.

# T A B L E

O F

## C O N T E N T S.

### A

#### Abatement of Writs.

**I**N trespass against husband and wife the writ shall abate if the husband died betwixt the day of *nisi prius* and the day *in banco*, Page 509  
If one *coparcener* or *jointenant* die pending the writ, it shall abate, 574. 583

#### Acceptance.

Where it shall take away title of entry for a forfeiture, 96. 193. 234  
Of a bond, or other security, before the day due, or after, whether it discharge the bond, 85, 86  
*See* *Leases*.

#### Accompt.

What plea shall be in bar, and what in discharge of an accompt, before auditors, 116  
Against one as guardian in soccage, whether he ought to recite the statute of *Marlbridge*, 229

#### Action.

*Adio moritur cum persona*, how to be understood, 540  
Where it shall be brought upon the *pri-*

*uity of contract*, and where upon the *privy of estate*, 183, 184  
Being transitory, it may be laid in any county, 444  
Action upon the case, for falsely procuring one to be indicted of treason, 15, 16. 239  
For laying felony to one's charge, 277. 286  
In matter of deceit, where it lies, 141, 142  
For misusing his horse, 20  
For rescuing one out of execution, and whether it lies for the party debtee, 107  
For falsly causing money to be twice paid, 141, 142  
In *nature of a conspiracy*, whether it lies against the one only, 239, 271  
How it shall be brought, 286, 315, 553, 554  
For keeping a dog used to bite sheep, 487  
For keeping a dog used to bite hogs, and which killed an hog, 254  
Against an apparitor, for falsely citing one, *ex officio*, into the spiritual court upon pretence of *faine*, 291  
For stopping ancient lights in an house, 325  
For stopping a water-course, which ran to his mill, 499, 500. 575  
For erecting a tallow-lurnace by a chandler, to the annoyance of an innkeeper and his guests, 510  
Against the bailiff of a liberty for suffering one, who was arrested at the plaintiff's suit to escape, 329, 330  
By

# TABLE OF CONTENTS.

|                                                                                                                                                                                                                 |               |                                                                                                                                                                                                                                                 |               |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| By an executor against the sheriff, for not returning a writ executed <i>in vita testatoris</i> ,                                                                                                               | 297           | action,                                                                                                                                                                                                                                         | 142           |
| Whether it lies for a commoner against his lord or any other, who erects a warren in the land adjoining, and with conies eat up the common,                                                                     | 387, 388      | Action upon the statute of maintenance,                                                                                                                                                                                                         | 142, 232      |
| For disturbance of a commoner by enclosure,                                                                                                                                                                     | 432           | Upon the statute of <i>scandalum magnatum</i> ,                                                                                                                                                                                                 | 133, 136      |
| Whether it lies in nature of a <i>valor maritagii</i> ,                                                                                                                                                         | 502, 503      | Action upon the case for words: if the words be uncertain, it lies not,                                                                                                                                                                         | 283           |
| For an hawk,                                                                                                                                                                                                    | 544, 545      | For words spoken at two several days, if damages be entirely given, and the words spoken at one time be not actionable, how judgment shall be given,                                                                                            | 237, 327, 328 |
| Whether it lies against tenant at will for waste done,                                                                                                                                                          | 187           | Whether it lies for saying <i>J. S.</i> is the reputed father of such a bastard,                                                                                                                                                                | 436           |
| Whether it lies by husband and wife, for wrong done to the estate of the wife during coverture,                                                                                                                 | 438           | Suspicion is no good cause to justify the speaking of slanderous words,                                                                                                                                                                         | 52            |
| Action of <i>trover and conversion</i> , whether it lies for money out of a bag,                                                                                                                                | 89            | For words slandering one's title,                                                                                                                                                                                                               | 140, 141, 469 |
| Whether it lies of a bond. What shall be said a conversion thereof: and whether the date thereof ought to be shewn,                                                                                             | 262, 545, 554 | Special prejudice must be therein alleged,                                                                                                                                                                                                      | 141, 469      |
| Whether it lies for the lessor, if he grant over, &c. against a stranger, or the lessee himself, for cutting and carrying away timber trees, during the lease for years,                                        | 242           | It is not within the stat. 21. <i>Jac. of limitations</i> ,                                                                                                                                                                                     | 141           |
| Whether it lies by the lessee for life, for cutting the loppings, which were reserved to the lessee, upon excepting the trees to the lessor,                                                                    | 437, 438      | For words in scandal to his place or office, 14, 15. 40. 192. 223. 229. 261. 459. 460. 510. 563.                                                                                                                                                |               |
| Whether <i>trover and conversion</i> of timber trees lies for the bargainee of him in reversion during the estate for life, being felled and carried away by tenant for life, or his grantee,                   | 274           | For words scandalizing his trade or living, 31. 211. 236, 237. 265. 270. 282. 317. 319. 382. 472. 515, 516. 570.                                                                                                                                |               |
| Whether <i>trover and conversion</i> lies for cattle put to pasture at a weekly sum, which are detained for not paying the pasturage,                                                                           | 271           | For words whereby loss of life or corporal punishment would ensue, 52. 92. 135. 140. 163. 177. 236. 268, 269. 277. 282, 283. 288. 307. 318. 320, 321, 322. 324. 326, 327, 328, 329. 337, 378. 414. 474, 475. 480. 489, 509, 510. 512. 553. 572. |               |
| <i>Trover</i> against husband and wife for <i>trover and conversion</i> of goods to the use of them,                                                                                                            | 494, 495      | For defamation and words of incontinency, 110. 155. 229. 261. 269. 285. 309. 322. 339. 393. 404. 436. 456, 457. 466. 486, 487.                                                                                                                  |               |
| Whether an action of <i>trover and conversion</i> is within the statute of <i>limitations</i> ,                                                                                                                 | 333           | Adjournment,                                                                                                                                                                                                                                    |               |
| Action of trespass upon the case, <i>quod vi et armis cepit et chafavit</i> his cattle into the close of <i>J. S.</i> for which, being <i>damage feasant</i> , he paid 40s. for amends to the said <i>J. S.</i> | 325           | How the adjournment of the Term, or any the returns thereof, is to be made, 11, 12. 27. 200. 460. 466                                                                                                                                           |               |
| Action upon the statutes of hue and cry, how they shall be brought,                                                                                                                                             | 211, 212, 213 | What day shall be the first day of the justices sitting, after the adjournment,                                                                                                                                                                 | 200           |
| Whether a writ of error lies upon that                                                                                                                                                                          |               | Administration and Administrators.                                                                                                                                                                                                              |               |
|                                                                                                                                                                                                                 |               | To whom it shall be committed,                                                                                                                                                                                                                  | 8. 9. 106     |
|                                                                                                                                                                                                                 |               | Whether it belongs to the husband after the wife's death,                                                                                                                                                                                       | 106           |
|                                                                                                                                                                                                                 |               | Where                                                                                                                                                                                                                                           |               |



## TABLE OF CONTENTS.

Where it shall be said to be granted generally, and where specially, 294  
 Where an administrator shall pay costs, 219  
 Administrator sued in the spiritual court, to make distribution of goods after debts and legacies paid, shall have a prohibition, 62, 63. 201, 202  
 Whether an administrator may have a *liberate* upon an extent sued by the executor of the intestate, who died before the extent returned, and the *liberate* sued, 451, 452, 457, 458, 459  
 Administrator *durante minore etate*, where his power determines, 516  
*See Executors.*

### Admiralty.

Resolutions upon the case of admiralty jurisdiction, 296, 297. 603

### *Ad quod damnum.*

Sued for stopping an highway, and how to be prosecuted, 266, 267

### Alien and Denizen.

Alien may be administrator, and take administration of leases, as well as of personal things, 8, 9  
 The father a merchant living beyond seas, his child born there shall be a denizen, though the mother be an alien, 601, 602

### Amendment.

Where it shall be of an original writ, and in what manner, 74  
 After issue 86, 92. 144, 145. 184. 203, 204. 273  
 Of a record after verdict upon the misprision of the *habeas corpora*, 32  
 Of records after writ of error brought, 85. 95. 574  
 Of the name of a juror, whether it may be by the statute of 21. *Jac.* 203. 564  
 Of the *nisi prius* roll after verdict, where the entry of the *nisi prius* roll was in *placito transgressionis*, and the plea and issue were in *placito debiti*, 274, 275

Of the record of a *postea*, whether it may be after the return thereof, 338  
 In point of judgment, and after certificate thereof, upon a writ of error allowed, 410  
 Upon misprision of the clerk, after writ of error brought, 574. 594, 595  
 The issue roll may be amended by the imparlance roll, but not *à converse*, 46, 92  
 A record of *quo warranto*, amended two or three years after the entry, 144  
 Where it is the default of the clerk in *judicial process*, there shall be amendment, 38

### Amercements.

Where the amercement of the plaintiff ought to be several, and where but one, 178  
 An infant ought not to be amerced, 410  
 Whether for amercements in the leet and court baron, upon a distress, damages and costs ought to be given to the avowant, 534, 535  
 Of a clerk for altering a record, 278  
 How amercements in the sheriff's tourn ought to be estreated and levied, 275

### Annuity.

Whether it be a real or personal action, 171  
 Whether on annuity for life granted to exercise the office of steward or park-keeper, shall be determined by the determination of the office, 59, 60  
 Whether an annuity may be demanded by bill, 171, 172  
 How the judgment in a writ of annuity shall be for the principal and arrearages; and how it shall be where it is against the heir, 436, 437

### Appeal.

Whether it may be brought in the next English county for a murder in Wales, 247, 248  
 Of an order or sentence from one place or court to another, which is there confirmed or reversed. The order is made peremptory, 350, 351  
 Appeal by the son and heir against his mother

## TABLE OF CONTENTS.

mother, for the death of his father,  
and judgment thereupon, 531, 532

### Appendant, Parcel, &c.

Where a new building, by encroachment upon the lord's waste, was adjoined to an ancient messuage *anno* 33. *Eliz.* And in 19. *Jac.* 1. the said messuage, *cum pertinentiis*, was demised for years; the said new purchase not being found to have been used together with the house, passed not by the words *cum pertinentiis*, &c. 17, 18. 169

Whether lands lying in *D.* four miles distant from the messuage of *J. S.* in *S.* yet always used and occupied with the said messuage, shall pass in a devise of the said messuage, *cum omnibus et singulis pertinentiis*, &c. 57

Whether land may be said to be appertaining to an house in the king's case, where it hath been let and occupied together with it, - 169

### Arbitrament.

What shall be good, 216, 217. 226.  
263. 383. 433. 434. 541

To pay money at a stranger's house, whether it be a good arbitrament, 226

At what time the nomination of an umpire may be appointed, if the arbitrators cannot agree, 263

Submission to arbitrament by several bonds, where it shall be said but one submission, - 433. 434

### Affets.

How the plaintiff shall have judgment upon affets found, 373

Whether it shall be affets by descent, where the father deviseth his land to his son and heir, upon condition that he shall pay his debts, &c. 17, 18. 161

### Assigns.

Whether an assignee in trust with others shall be charged by the receipt of his companions, or only upon his own receipt, - 312

Of what covenants an assignee of a

term shall take advantage by the common law, or by the statute of 32. *Hen.* 8. c. 25. 137. 503. 580

How the assignee of a reversion shall bring covenant against lessee for years, 285

Whether an assignee of an estate, to which a future use and contingent estate is annexed, may have benefit of the contingent use, 358, 359

Assignee of a rent: with what covenants chargeable, 24, 25, 221, 222

Assignee of a reversion, of what covenants he shall take advantage, 137

### Assise.

Of what things it lies, - 555

Of darrein presentment, - 341

Of a rent, 507, 508. 520, 521

Where an assise of *mortdaunce* lies of land demiseable, - 563

### Assumpsit, 345. 384.

What shall be said a good consideration in an *assumpsit*, 19. 70. 77

It lies not, being grounded upon a personal promise in a real contract, if the real contract be executed, 415

Damages recovered in an *assumpsit* cannot be a bar to a debt upon a record or specialty, - 6

In an *assumpsit* to pay a debt, the plaintiff must shew the cause of the debt; but not so upon an accompt, 116

Whether it lies for rent upon a lease for years, upon a general *indebitatus*, 347

In consideration that he shall make a lease for years, a lease is made for years, rendering rent: if an *assumpsit* lies for the rent in arrear, 415

Whether it lies presently, where the contract is to pay at several days, and makes a failure at the first, 241. 350

Whether one may plead in discharge thereof, without shewing how, 384

Upon consideration past is good, if it be upon the defendant's request, 409

To pay *tantum quantum meruit* for such a thing, or for doing such an act, where it shall be good, 77. 573

To forbear a debt *paullulum tempus*, whether it be good, &c. 241

To forbear a debt *aliquo tempore*, and he alledges that he forebore for a year,

# TABLE OF CONTENTS.

year, if it be good, 409, 438  
 To pay money upon a simoniacal contract, 337, 353, 361  
 To pay money upon interest, &c. 272, 273  
 In consideration that he should deliver a general acquittance, he alledgeth that he delivered a general acquittance to a stranger, to the use of the party, 19  
 In consideration that they shall accompt together; and the defendant, being found in arrearages, promised to pay, 116  
*Assumpsit* to pay for wedding apparel, to what apparel it shall extend, 53  
 To give so much in marriage with his daughter as he gave with any other daughter, how to be expounded, 186  
*Firmum facere* to such a woman such a portion; whether it amounts to a warranting of so much, &c. 202  
 To pay so many French pieces, whether they be to be intended French crowns, 194, 195  
 See 384, 385 *in tit.* Consideration and Time.

## Attainder.

In a *præmunire*, how it shall relate, 172  
 Attaint lies in a writ of enquiry of waste, 414

## Attorney.

What privileges he hath, 11, 389  
 How punished for dealing falsely in his place, 74  
 Whether he shall have an action of debt for sums which he laid out, as solicitor, in another court wherein he is not attorney, 160  
 For what sums laid out by him he shall be allowed, 107, 159, 160  
 Whether he shall maintain an action for calling him "*common barrator*," 192  
 See *in tit.* Fines assessed, and Privileges.

## Attornment.

Whether attornment to the grant of a reversion may be by words of assent thereto, spoken to a mere stranger, and what shall be a good attornment, 440, 441

## Audita Querela.

What shall be a good surmise in an *audita querela*, 153, 214  
 Against whom it shall be brought, where one recovers debt and assigns the extent over, and afterwards releaseth all judgments and executions, 214  
 Upon a judgment in trespass by two, furnishing that a third person was party to the trespass, and after the judgment had made satisfaction for the same, 443, 444  
 By three; where judgment is against all three, and one is taken in execution, whether the two who were not taken in execution may join with him, 443

## Averment.

When it may against the words of a deed, 501  
 Where it ought to be specially pleaded, 61  
 Where a general averment shall be allowed, 542, 543  
 That a recovery against *J. S.* for trespass of battery in one county, and against *J. N.* for trespass of battery in another county, is one and the same trespass, 444

## Ancient Demesne.

Whether it may be pleaded after imparlance, 9  
 Custom there, that the lands are descendible to the eldest daughter, 484

## Avowry.

If an avowry for part of a rent, and shews not how he is satisfied of the residue, is ill, 104  
 Whether in an avowry for an heriot, the avowant ought to shew the kind of beast, and the price thereof, 269  
 Where costs and damages shall be allowed in an avowry, 497, 532, 533, 534, 535

## Authority.

When it shall be said to be pursued, 213  
 What



## TABLE OF CONTENTS.

What shall be authority to an executor to sell after the death of tenant for life; and whether a surviving executor may sell, - 382

Award. *See* Arbitrament.

### B.

#### Bankrupt.

What interest he hath in goods extended before the *liberate*, 149. 166. 176, 177

How a debt due to a bankrupt by simple contract, and assigned to a creditor by the commissioners, shall be recovered, - 187, 209

Whether an inn-keeper be within the statute of bankrupt, 549, 550

Whether a shoemaker be within the said statute, - 31

*See tit.* Bargain and Sale, and Copyhold.

#### Bargain and Sale.

Where, by custom, copyholder in fee dying seised, his wife is to have it during her life; and he becoming bankrupt, the commissioners, by indenture inrolled, bargain and sell the said land: the husband dies, the wife is admitted, and afterwards the bargainee admitted; whether the estate vested in the bargainee before admittance, - 358, 359

Baron or Peer. *See* Peer.

Barons of the Exchequer. *See* Judges.

#### *Baron and Feme.*

Where they ought to join in actions, 419. 437. 438. 505. 554. 594

Where they ought to be sued jointly, 254. 417

Where he shall have the sole action for beating his wife, 90, 91. 175

Husband and wife are sued to outlawry,

and before the outlawry the *baron* or the *feme* appear: what shall be done, and how the appearance shall be entered, - 58, 59

Husband and wife administratrix, recover debt and damages: the wife dies: the husband shall not have *scire facias*, 208, 227, 228. 464

Husband and wife executrix, how the judgment shall be upon a *devastavit* of the wife, 519. 526

Husband releaseth the suit of his wife, for defamation, in the spiritual court.

It is a good release *quoad* the costs, but not *quoad* the defamation, 222

Husband sued by his wife in the spiritual court, inforced to pay his wife's costs in suit against himself, 16

Husband and wife sued in trespass; the husband dies betwixt the day of *nisi prius* and day *in banco*: whether judgment shall be entered against the wife, - 509

Husband and wife sue in trespass; the husband is acquitted: whether the judgment shall be against both *quoad capiantur*, 406, 407. 513

Husband copyholder in right of his wife forfeits it: whether the wife and her heirs, after the death of her husband, shall be bound thereby, 7

Husband seised in fee, makes feoffment to the use of himself and wife, and to the heirs of the survivor of them; and afterward makes a feoffment of the same land, and dies: the wife enters: the feoffment of the husband hath destroyed the contingent use of the fee, - 102

Husband and wife, jointenant in fee by purchase, during the coverture: the husband sole makes a lease for twenty-one years by indenture, rendering the ancient ren', and dies: whether it shall bind the wife, 22, 23

Husband possessed of a lease for years, he and his wife join in a lease, rendering rent to them and the survivor of them: whether the rent be good to the wife, 288, 289, 290

A wife, tenant for life of an hop-ground, dies immediately before their gathering, the husband shall have them, - 515

Whether the husband may devise the wearing jewels of his wife, 343, 344, 345, 346. 347

## TABLE OF CONTENTS.

They cannot be jointly charged for converting goods to their own use, 254.  
494, 495

*See tit. Feme.*

### Baronet.

Whether it be a name of dignity, and within the intention of the statute of  
1. *Edw. 6. c. 4.* 104. 371, 372

### Barrator.

Action brought by an attorney for calling him common barrator, 192  
Indictments for barratry, 340. 348

### Bar to Actions.

Bar certain to common intendment is good, 6. 195  
If a replication be not good, yet if the bar be ill in substance, judgment shall be for the plaintiff, 5  
Being pleaded at large, where it may be answered by replication at large, 384  
In an action of *trover* for goods; that he recovered in trespass for the same goods, 35. 36  
Pleaded in debt upon an obligation, although it answers not precisely to the condition, yet where good, 195

### Bastard.

Who shall be accounted the reputed father of a bastard child, 341. 350.  
351. 470  
How a bastard shall be provided for by the parish, or by the reputed father, pursuant to the statutes of 18. *Eliz. c. 3.* and 3. *Car. 1. c. 4.* 341. 350.  
351. 436. 470, 471

### Battail.

Battail gaged in a writ of right, 522

### Bail.

Falsely offered and insufficient, how to be punished, 146  
Bail sufficient tendered to a serjeant, who by one was arrested upon a plaint in London: whether the serjeant be

bound to accept thereof; and what remedy for the party if he should refuse, 196

Bail granted upon *habeas corpus*, 507.  
552. 558

Writ of error brought by the bail, for a judgment given against the principal, 562

Where a *capias* is sued against the bail, and he taken in execution, without any *scire facias* sued against him, it shall be error, 562

Writ of error brought by the principal and bail, for an error in the principal judgment, and execution against the bail; and therefore abated, 408.

574, 575  
Bail in the king's bench, how it differs from bail in the common pleas, 481

### Bailiff of Liberties.

Whether he may make an extent upon an *elegit*, and deliver the moiety, 319  
Where he shall justify and excuse, where the sheriff himself cannot, 446, 447

### Bill of Exceptions.

Where and when a bill of exception shall be for not admitting evidence; and what shall be done thereupon, 332

### Bill of Review.

Where it cannot lie, 40. 312. 351

### *Bis petitum.*

Where aided after verdict, 301

### Bishop.

What grants or leases of bishops shall bind their successors, 16, 17. 47, 48, 49, 50. 256. 258. 279. 557  
Of an ancient office, with an addition of a new fee which is confirmed; whether it shall bind the successor for any part, 47, 48, 49, 50. 279. 557  
May grant letters of institution under any seal, and out of his diocese, 342  
His certificate of a couplement in loyal matrimony, 351, 352

### Brewers.

Whether they may be said to be victual-lers

## TABLE OF CONTENTS.

lers within the statute of 21. Hen. 8.  
c. . . . . 113  
Whether brewers and bakers be within  
the statute of 5. Eliz. c. . . for using  
a trade, &c. . . . . 499

*Braeria*, what, 179.

Burning of Houses.

Where it is felony, and where not, 337,  
338

Borough English.

The custom thereof expounded, 411,  
412, 413

Bye-law.

What, and whom it shall bind, 498

C.

*Capias*.

It cannot be awarded against the prin-  
cipal without suing *scire facias* against  
the bail,

Where judgment shall be *ideo capiatur*,  
178, 340. 406, 407

*Capias* omitted in an indictment of re-  
cusancy; and therefore erroneous,  
505

Certificate.

"*De accouple in loyal matrimony*," how  
to be made, . . . . . 351

Of one being beyond seas, under the  
seal of the town where he was resi-  
dent, without oath, for the truth  
thereof; and one sworn for the expo-  
sition thereof, is not allowable, 365

*Certiorari*.

Where it may be awarded to certify  
another *certiorari*, . . . . . 91

Where it may be to certify an original,  
where an original is alledged to be  
certified, . . . . . 91. 410

To remove an indictment of felony out  
of the cinque ports, how to be direct-  
ed, 252, 253. 264, 265. 291

To remove a record out of the king's  
bench into the chancery, whether al-  
lowable, . . . . . 297, 298

Whether it may be directed into *Wales*  
to remove an indictment from thence,  
331, 332

Chancery.

How said to be always open, 3

Its jurisdiction, . . . . . 190, 191

Whether it can give relief against dow-  
er, . . . . . 191

Whether a decree in chancery shall not  
be re-examined upon bill of review,  
40. 312

The proceedings there, upon a statute  
staple, 451, 452. 458, 459

Cheating.

With false dice, how to be punished,  
234

Judgment against one for cheating with  
false tokens, . . . . . 564

Churchwardens.

Elected by the parish and not by the  
parson, . . . . . 552

Writ awarded to the ecclesiastical court,  
for admitting him to his office, 589

Where they shall have double costs in  
suits against them, 175. 285. 467

*Cinque Ports*.

Their liberties, 247. 252, 253. 291

How writs ought to be directed thither,  
252, 253. 264, 265. 291

Clergy.

Where it shall be taken away from one  
who robs a chamber in an inn of  
court, no person being in the said  
chamber, but in other parts of the  
house, . . . . . 473, 474

If the principal prays his clergy, and  
hath allowance thereof, the accessa-  
ry to be discharged without being put  
to his book, . . . . . 566, 567  
Collusion,



## TABLE OF CONTENTS.

### Collusion, Covin, or Fraud.

Where it shall be intended without being found, 483, 484  
Where it shall not be intended unless expressly found, 550, 551

### Commission and Commissioners.

Commission in the time of one king executed in the time of another before notice: whether it be not determined, and to what purpose it shall be good, 97, 98, 99  
Commissioners for ecclesiastical matters, how, and in what cases, they ought to proceed, by fine or imprisonment, 113, 114, 220  
*See Court Ecclesiastical.*

### Common and Commoner.

Whether a commoner may kill conies eating up his common, 387, 388  
Common granted *ubicunque et quando-cunque averia sua fuerint*; what passeth thereby, 599  
Common appendant cannot be severed from the soil by grant, 542  
Common appurtenant to a manor, being certain, may be annexed to parcel of the manor, or may be severed from it, 432  
Whether common appurtenant may be created by deed within time of memory, and whether it may be divided, 482  
Common granted to one in his manor and lands of *D.* The grantee may claim common in any part of the manor, 599  
None may entitle himself to any profit *à prender in alieno solo*, without grant or prescription, 542

### Common Recovery.

Against the king, not good, 96  
By an infant, how good, 307  
*See Recovery.*

### Conditions.

What words shall make a condition, 128, 129, 455, 456  
The performance of a condition precedent ought to be averred, 195, 381

Condition of an obligation to enjoy such lands; whether the obligor is to warrant it against unlawful titles, 5

Condition to surrender upon forfeiture of payment of money at a day certain: the money is paid before the day; whether it be a good performance, 284

Upon an obligation to perform all covenants, payments, and agreements in a lease: whether the obligor ought to pay the rent without demand, 76, 77

Lessee for one-and-twenty years, upon condition that he shall not alien any part above three years, during the term; if otherwise the lease to be void: who lets for three years, and so from three years to three years, during the term of his life, if he lived so long: whether this were a breach of the condition, 511, 512

### Confession and Avoidance.

Where one of the parties claim by a later grant from one of the same party, there needs not any confession and avoiding his title, 581  
What shall be a good confession and avoidance in a plea; and where it shall be good without traverse, and where not, 325, 494

### Confirmation.

Where it may enlarge an estate, or make an estate *in esse*, which was barred by a fine, 478, 479  
Of a lease by a parson made in 9. *Eliz.* the confirmation being in 14. *Eliz.* by another patron and ordinary than were at the time of the lease made, yet good, 38

### Consideration.

In *assumpsit*, 8. 19, 20. 178. 272, 273, 409  
To raise uses, 529  
To forbear *paullulum tempus*, 241  
*See Assumpsit.*

### Consultation.

Granted for the probate of a will *quoad bona*,

## TABLE OF CONTENTS.

*bona*, where the will is made of lands and goods, 165, 166, 391. 395  
Whether it shall be granted without motion, if the defendant answer not to the prohibition, 238, 239  
*See Prohibition.*

### Copyhold and Copyholder.

How a copyhold estate shall be pleaded, 190  
What shall be said to be a reasonable fine for a copyholder to pay upon his admittance, 196  
A copyholder by the common law, without special custom, cannot make a lease for one year; but it is a forfeiture, 233, 234  
Whether copyholds be within the statute *de donis*, 42, 43, 44, 45  
Whether copyhold lands are liable to the statutes of bankrupts, 549, 550. 568, 569  
Copyholder by licence lets it by indenture, with divers covenants; and afterwards surrenders to the use of another: whether his assignee shall have benefit of the covenant, 24, 25  
Copyholder for life surrenders to the use of another, and the lord accepts, and grants it to *cestuy que use* for his life: he dies: whether the first copyholder shall re-have it, 205  
Copyholder surrenders out of court; in whom the interest rests, until he be presented and admitted, 273, 283. 569, 570  
Copyholder surrenders twenty acres into the tenant's hands, according to agreement upon condition, to be void, &c. and before the time prefixed, he surrenders one of the twenty acres to another, and afterwards performs the condition: whether this second surrender be good, 273, 274. 283, 284  
Copyholder surrenders to the use of one out of court, upon condition to be void; and afterwards, before the condition performed, surrenders to the use of another: the condition is performed; the second surrender is presented, and the party admitted, the first never being presented: whether it be good, 273, 274. 283, 284  
Lord of a manor makes a lease thereof, and of a copyhold therein, by the name of such a tenement: whether

the copyhold be not determined, 521  
Copyholder for life claims a custom to cut down and sell trees, &c. 220, 221  
*See Surrender.*

### Coroners.

Coroner's inquest, of what persons it ought to be taken, 134  
Where a writ awarded to the coroners, where the sheriff is plaintiff or defendant, be error, 345, 346

### Corporations.

What acts they may do without deed, 169  
Where the mis-naming of a corporation shall make a deed or record ill, 160. 572. 574

### Costs and Damages.

Whether they may be assessed without verdict, 582  
Where after special verdict the plaintiff discontinued: whether the defendant shall have costs, 575  
Where costs and damages shall be allowed to avowants, 497. 433, 534. 535  
Where they shall be against an administrator, or an executor nonsuited, 29. 219  
The defendant shall have costs, where the declaration is ill, 175  
Costs given *pro dilacione executionis* in a writ of error, 401  
Costs released in the spiritual court by the husband for the defamation of his wife, 222  
Costs paid in the spiritual court by the husband for his wife, upon his wife's suing him there, 16  
Where they shall be discharged by the general pardon, upon sentence in the spiritual court for defamation, and where not, 46, 47. 114  
Where double costs shall be upon false suit against churchwardens and other officers, 175. 285, 286  
Attaint brought by the plaintiff upon an action of battery, which had passed against

## TABLE OF CONTENTS.

against him, and now the first verdict was affirmed: whether by the statutes of 21. & 23. Hen. 8. c. the defendant shall have any more costs, 542

### Covenant.

By what words made, and how to be construed, 128. 129. 207  
Where the word "*provided*" in an indenture shall make a covenant, and where a condition, 128, 129  
In covenant one may assign several breaches; but not in debt upon an obligation for performance of covenants, 176  
The breach of a covenant being in the time of an assignee, and an action brought by him, the covenantee cannot release this action, 503  
Whether a covenant shall bind an infant to be an apprentice, 179  
Where covenants in deeds shall be said to be distinct by themselves; and where they shall relate and be expounded by precedent covenants, 107  
How action of covenant may be brought by an assignee for not repairing an house; and what shall be said to be a breach thereof, 24, 25  
Brought against an assignee or grantee, 188. 221, 222  
Whether it lies against the lessee, where he hath assigned over his estate, and the assignee is accepted for tenant, 183. 221. 580  
Made by an assignee of a term for life, and by him in reversion: whether the action shall be brought as assignee of both, or of him who hath the inheritance, 285  
Covenant to make surrender of a copyhold upon request, 299  
That land shall be of such value yearly, and that he will stand seised, 360

Covin. See Collusion.

### Counsel.

Assigned to one arraigned for felony, 147. 365. 483  
What matters they may plead and give in evidence, 365  
Where a person indicted shews any ex-

ception in law, any one not assigned may be of counsel for him, 147

Counts. See Declaration.

### Courts.

The customs and precedents in every court are the laws of the court, 527. 528  
Of what customs the courts are bound to take cognizance, without special pleading, 562  
The court shall not take cognizance of any errors upon the record, unless they be assigned, 53  
Where title appears for the king; whether the court is bound *ex officio* to award for him, 590. 592  
Of star-chamber, its foundation and jurisdiction, 168. 531  
To what purposes sentences there shall bind, 56. 65

#### 1. COURT OF CHANCERY. See Chancery.

#### 2. COURT OF KING'S BENCH.

Its power, 182. 209, 210, 330  
Issue being joined in chancery, and the record delivered into the king's bench, may be well tried by *nisi prius* out of the king's bench, 313

#### 3. COURT OF THE COMMON PLEAS.

Its privileges for the serjeants and officers thereof, 11. 84, 85  
Different manner of proceedings betwixt the king's bench and common pleas, 481. 528  
Its ancient jurisdiction in granting prohibitions to court christian, where they proceed in prejudice to the common law, 88

#### 4. COURT OF THE EXCHEQUER.

May devise as well for life as for years the king's lands, under the exchequer seal, 513

See *tit.* Offices by Inquisition.

#### 5. Court



# TABLE OF CONTENTS.

## 5. COURT OF THE EXCHEQUER-CHAMBER.

Of what antiquity, - 514  
Whether an error in deed is assignable in the exchequer-chamber, 514  
In what cases writs of error lie in the exchequer-chamber, 142. 286. 300. 464

*See tit. Judges.*

## 6. COURT ECCLESIASTICAL.

Whether they may deprive any of his office which he hath for life, 65

## 7. COURT OF HIGH COMMISSION.

Its power, 113, 114. 220. 582  
How fines imposed are to be levied, 579

## 8. INFERIOR COURTS.

COURT OF REQUESTS, 595, 596

COURT OF MARSHALSEA, 318, 571

COURT OF THE STANNARIES in Cornwall; and their manner of proceeding, - 333

COURT OF THE MARCHES OF WALES; and its institution and jurisdiction, 309 531. 557. 558. 595

COURT OF THE ADMIRALTY, 296, 297. 603

COUNTY COURT, Tourn, and LEET.

*See Leet and Tourn.*

Where the Court of PIEPOWDER ought to be held, and for what matters and contracts in markets and fairs, - 45, 46

Where the courts baron of several manors may be held at one place; and how they shall be good, and where not, - 367

*See Amercement.*

Where inferior courts in pleading ought to shew their authority and creation, 46

They cannot allow protections, *ley gager, &c.* 112. 146

A *supersedeas* awarded to an inferior court, because an utter-barrister was not steward, - 79

*Cum Pertinentiis. See Appurtenances.*

**Custom.**

How to be pleaded, 347

What shall be good, 65. 196. 259, 260  
The customs and precedents of the courts are the law in all courts, 527, 528

Of what customs courts are bound to take cognizance, without special pleading, - 563

Several customs for the payment of tithes, 113. 237. 339. 403, 404

Custom to grant a freehold by copy; whether it be good, 200

Custom of Borough English, how it shall be construed, 411, 412

Custom, that every one shall be constable in such a village according to their habitations: whether it shall bind a privileged person, 389. 585

Custom amongst merchants upon bills of exchange: what shall be good, and what remedy upon non-performance, 301, 302

That a *feme covert* in London shall be sued without her husband, how to be expounded, - 68, 69

Custom in London to arrest upon plaint entered in the compters, without any other warrant; if good, and whether the serjeant ought to take bail, 196

Where a custom in London may be against a statute, 347. 361

## Curriers.

What leather they may sell uncut, and to whom, - 588, 589

## D.

## Damages.

Where they ought to be entirely given, and where not, 20, 21. 186. 414

Entire, for words spoken at several times, - 236, 237

Where damages found against one defendant shall bind the other, 54. 55. 192, 193

Where they may be severally given against defendants, and shall be recovered accordingly against them; and

## TABLE OF CONTENTS.

and where the plaintiff ought to have  
but damages of one only, 54, 55,  
243  
Recovered in an *assumpsit*, cannot be a  
bar to a debt upon a record or speci-  
alty, 6  
Where conditional damages may be gi-  
ven by the jury, 32, 33, 143  
Where they shall be enquired by the  
same jury, where a demurrer is upon  
the evidence, or shall be enquired of  
after judgment by a writ of enquiry,  
143  
Damages awarded in a writ of error  
upon judgment affirmed, according  
to the loss which the party sustained  
by not having his execution, 145  
Where damages and costs shall be as-  
sessed or increased by the court, 175,  
561  
Whether treble damages may be given  
by a justice of peace upon the stat.  
of 23. *Hen. 6. of Extortion*, 438,  
448  
Where a penalty is given by a statute,  
there ought not to be any more given  
for costs or damages, 560  
Where a statute gives a penalty certain,  
and gives an action of debt, if the  
defendant doth not pay it, but in-  
forceth the party to suit, he shall re-  
cover his damages due by the statute  
upon demand, and his costs also, 560  
*Vide tit. Costs.*

*Darreyn Presentment. See Assise.*

### Daughter,

A daughter performs the condition to  
pay money upon a mortgage; a son  
is born after: whether the daughter  
may retain or the son may *oust* her,  
87  
Custom in ancient demesne, that lands  
are descensible to the eldest daugh-  
ter, 484

### Day.

No day shall be given to a defendant  
against whom a verdict is found, 236  
*Feme sole* recovers in an action, and be-  
fore day *in banco* takes husband; she  
notwithstanding shall have judgment,  
237  
Whether it may be given against one

defendant upon verdict, where day  
is given unto the other until the next  
Term upon demurrer, 235, 236  
Where it may be given until the next  
court, without mentioning a day cer-  
tain, 254  
How acts done in Term-time shall re-  
late to the first day of the Term, 102  
How the days in Term shall be reckon-  
ed, and to what purpose, 13  
*Quarto die post* of the return is properly  
the day of sitting, and not before, 15,  
102  
*Idem dies* shall not be given to any who  
make default, 341

### Death.

Whether the death of one of the defen-  
dants before the judicial process  
awarded be cause of error, 426, 574  
Whether, when one sues a judicial  
writ and dies, it being served by the  
sheriff and returned afterwards, be  
good, 450, 451, 452, 458, 459  
*See tit. Abatement of Writs.*

*Decem Tales. See Tales.*

### Declaration and Counts.

Where they ought to shew the begin-  
ning of the particular estate, 571  
Where it is but conveyance to the ac-  
tion, it needs not be so precise as in a  
plea, 139  
Whether it be good, although not war-  
ranted by the original writ, 272, 281,  
282, 327  
Declaration ill, because it therein ap-  
pears that the action was brought  
before there was any cause of action,  
575  
Where it needs not be filed, 532  
Where it shall be made good by the  
plea in bar, 288  
Where, being uncertain, it is made good  
by the verdict, 420, 497, 531  
Where it shall be good if it hath suffi-  
cient substance, although it be not  
according to the usual form, 209  
Not good if by way of recital only, and  
not direct affirmative, 553  
Whether in covenant it may be *per tes-  
tatum existit*, 183  
Whether in the annuity for life, it ought  
to be *in dominico suo ut de feodo*, 186  
Whether

## TABLE OF CONTENTS.

Whether in an ejectment it be good,  
although it wants *vi et armis*, 407

Whether in trespass *vi et armis*, and  
not saying *contra pacem*, it be good,  
325

Whether in debt upon an obligation,  
and doth not say *quod per scriptum  
obligatorium concessit*, it be good,  
209

Where in an *audita querela*, although  
vitious, it shall be good, if the writ  
comprehend matter sufficient, 153

Where it ought to have precise certain-  
ty, 507. 443. 497

In an ejectment of one hundred acres  
of bog *interritoriis de Ireland*, 511,  
512

*De piscaria* in Ireland, 492

In an action upon the case, for stop-  
ping a water-course, 499, 500

See *tit. Error and Judgment*.

### Deeds.

How they ought to be expounded, 230.  
386. 417. 548

To what time a deed shall relate, be-  
ing delivered by three at one time,  
and by a fourth at another, 263

If raised by the party himself after deli-  
very: whether the interest thereby  
conveyed be as well determined as  
the deed itself, 399

Whether if pleaded and mis-recited in  
substance it be ill, 426, 427

See *tit. Grants, and Monstrans de Faits*.

### Default.

Where the default of one defendant  
shall prejudice the other, 251

After default, the issue and pleading are  
out of the court, 517

### Defence.

How it ought to be made in a writ of  
right, 310, 311

### Demand.

Of rent, how, and at what time, it  
ought to be, 76, 77

Of a rent-seck, where it shall be made,  
508. 521

See more in Request.

### Demise of the King.

What acts shall be determined by the  
king's demise; and what shall stand  
good until notice, &c. 1, 2. 97, 98

Whether it shall abate or discontinue  
original writs, upon a penal act  
brought by the informer for the  
king and himself, 10, 11

### Demurrer.

Where a general demurrer may be with-  
out shewing cause by the defendant  
in the conclusion of the plea, *viz. et  
hoc petit, &c. or de hoc ponit, &c.*  
162

Where there is a demurrer upon evi-  
dence, the jury ought to be discharg-  
ed without more enquiry, 143

A demurrer cannot be waived without  
the consent of him who demurred,  
513

### Departure in pleading.

What shall be said to be so, 76, 77.  
228, 229. 246. 257

### Deputy.

Deputy is allowable in ministerial offi-  
ces, 557

If he misdemean himself, it is a forfei-  
ture, 557

Who ought to approve of the sufficien-  
cy of a deputy, 557

### *De son Tort Demesne.*

Where it shall be to the issue, 138

The party himself shall not take advan-  
tage thereby, 240, 255

### Debt, Debtor, &c.

Whether it lies for waste where one is  
obliged to perform all covenants and  
payments in an indenture of lease, 76,  
77

Debt upon a simple contract lies not  
against executor or administrator, 187

It lies not for an attorney against him  
who retained him to prosecute for an-  
other, 193, 194

Brought



## A B L E O F C O N T E N T S.

Brought against the executors of a sheriff for money received by their testator, upon an execution, 539, 540  
 Upon a lease for years, whether it may be brought by the assignee of the reversion in another county than where the land lies, 143, 183  
 Against one as heir to his brother, and it was found that he had the land, as heir to his nephew, 151  
 Upon a contract assigned by commission of bankrupts; the debtor dies: if the assignee shall have the debt against the executors of the debtor or not, 187  
 Debt upon an obligation good, although he declares *per scriptum obligatorium*, 209  
 Upon a penal statute, 256, 257  
 Debt in the common pleas or other courts, upon a judgment in the king's bench: if *nul tiel record* be pleaded, how it shall be certified, 297, 298  
 Debtee where he makes one of the debtors his executor: whether the debt be determined, 372, 373

### Devastation.

What shall be a *devastavit* by an executor, 490, 491. 564  
 In husband and wife for the devastation of either, 603

### Devise.

How they shall be expounded, 23, 24. 39. 129, 130. 157. 185, 186  
 Where a devise shall convey an inheritance by implicit words, 23, 368, 369. 447  
 What shall be a countermand and total revocation of a devise, and what not, 23, 24  
 Devise of an house *cum pertinentiis*: whether land occupied therewith passeth, 57  
 Of all his goods and mortgages to his executors, is a good devise of the land mortgaged, 37  
 Of all his lands and tenements: if he hath land in fee and a lease for years, what shall pass thereby, 292, 293  
 Of land paying such a sum out of the issues and profits thereof, how it shall be expounded, 158  
 Of land to one son and his heirs, and

of other land to another son and his heirs; and if any of them die without issue, the other shall be his heir; whether it be an estate tail, and how to be expounded, 185, 186  
 Devise to his brother and his heirs; and for default of such heirs to the sister and her heirs: whether it be a good remainder, 57  
 Devise to three and their heirs, and to every of them part and part alike: they are tenants in common, and not jointenants, 75  
 To his son and heir of his land, upon condition he shall pay his debts: whether it shall be assets by descent, 161  
 To *John* his son and his heirs of his body in fee; and if he die in the life of *Alice* his wife, that then *William* his second son shall be heir to *John*. Afterwards *John* dies, having issue a son in the life of *Alice*: whether *William* shall have it in the life of the son of *John*, 158  
 To his wife for life, and that afterwards his executors shall sell and distribute the money to such, &c.: whether they have any interest in the land, or but an authority only, and whether the survivor may sell it, 382  
 To his executor for life, and that he shall sell the said land, if there be not assets to pay his debts; he sells by deed enrolled: whether the said sale be good, 335, 336  
 Devise of his lands in lease to his executor for life, the remainder over; there ought to be a special assent thereto by the executor, as to a legacy, or else it is not executed, 293  
 Devise of his lands in *A.* and *B.* to several persons and their heirs, and all the rest of his goods, leases, estate, mortgages, &c. whereof he was possessed, to his wife, whom he made executrix; an estate only for life passed, 447. 449, 450  
 Of an house called *THE WHITE SWAN*, where *Nicholls* inhabits, whereas he hath but three rooms therein: whether the entire house passeth, 130, 131  
 Of his corner house in the tenure of *J. S.* and *J. N.* and the said house is in the tenure of *J. S.* and *J. D.* and *S. f.* his

## TABLE OF CONTENTS.

his house adjoining is in the tenure of  
*J. N.*: whether and what shall pass,  
 447, 448. 473  
 Devise of a term, with divers remain-  
 ders over, to make a perpetuity;  
 whether good, 230  
*See tit. Tenement.*

### Diminution of Records.

Where, how, and of what things it  
 shall be all, wed, being certified upon  
 a writ of error, 90  
 At what time it ought to be alledged,  
 90  
 Whether it may be of a writ original,  
 when a writ is before certified, 90,  
 91. 272

### Descent.

Of a reversion expectant upon an estate  
 for life, how it shall be construed in  
 case of custom, 411, 412  
*See tit. Fines.*

### Discharge.

Where it may be good by parole in an *af-  
 sumpsit*, without shewing how, 383,  
 384  
 Where a prisoner may be discharged by  
 parole, 447  
 Whether forest lands in the hands of a  
 purchaser be discharged from pay-  
 ment of tithes, 94  
*See tit. Release.*

### Discontinuance of Suits.

What shall be said to be a discontinu-  
 ance of process, 235, 236  
 Where it may be pleaded to part, and  
 not to all, 313  
 Whether it shall be a discontinuance of  
 a plea, where day is not given to one  
 of the defendants after verdict;  
 where the court will advise until ano-  
 ther Term, 236  
 Whether after verdict it be aided by  
 any statute, 235, 236

### Discontinuance in Lands.

Where an act may be a discontinuance  
 now, and not be a discontinuance by

matter *ex post facto*, 406  
 Whether it shall be a discontinuance of  
 the possession, where husband and  
 wife, tenants to them and the heirs  
 of the body of the husband, remain-  
 der over, makes a feoffment, and af-  
 wards levies a fine to the same feof-  
 fee, and the husband dies without is-  
 sue, and the wife survives, 320,  
 321  
 Whether it shall be a discontinuance of  
 the reversion, where tenant in tail and  
 he in reversion in fee join in a lease  
 for life, 385, 405, 406

### Dispensation.

Whether a dispensation to take a second  
 benefice may be upon condition, and  
 by what words, 475, 476  
 To take a second benefice *modo non fit  
 ultra* twenty miles, how to be ex-  
 pounded, 475, 476

### Disseisor and Disseisin.

Who shall be disseisor and tenant,  
 where the lessee at will makes a lease  
 for years, rendering rent, and the  
 lessee for years enters and pays the  
 rent, 303, 304  
 Whether it be a disseisin, where lease  
 for life is made with a letter of attor-  
 ney to make livery, *HABENDUM a  
 die datus* of the livery, 388, 389  
 Disseisin of a rent seek, for refusing to  
 pay it, being demanded, at the place  
 where it is issuing, 508  
 Tenant in remainder disseised, not  
 knowing thereof, levies a fine to a  
 stranger: whether it shall bar his  
 right, and enure to the benefit of the  
 disseisor, 284, 303, 305

### Distress.

Where a distress may be maintained by  
 one who claims by a consor by fine  
 or other record, without a *feire fa-  
 cias*, 598  
 Distresses for *valor maritagii*, relief, or  
 for amercement in leet; whether  
 maintainable, 533, 534

### Divorce.

What be absolute, and what temporary,  
 462, 463  
*Prophe*

# TABLE OF CONTENTS.

*Propter sequitiam*, 16. 461, 462, 463

## Double Plea.

Where it shall be, if he consels and avoid and traverse, and how it ought to be specially alledged upon demurrer, 61

## Dower.

Of what things it is demandable, 300, 301

Demandd against equity and the husband's agreement, at the time of the purchase (that instantly he should reconvey it): whether it shall be recovered in a court of equity, 190, 191

*Nunques accouple que dower* pleaded, 351, 352

## E.

### Ejectment.

Of what things it lies, 555  
Whether it lies for tythes, 301  
Whether it lies for him who hath only *primum consuram* in land, 362  
Of an hundred acres of bog in *Ireland*, 512  
Of a piscary, 492  
*De uno repositoio*, 554. 555  
What special plea is allowable therein, 404

### Election.

Where it is at the election of the party injured to have several actions, 242, 243. 303. 539. 540

### Elegit.

Whether the bailiff of a liberty, who hath return of writs, may make an extent upon an *elegit*, and deliver the moiety, 319  
Where the writ recited the judgment. *Et quod elegit executionem* of the

goods and moiety of the land; and in the precept to the sheriff the words *medietatem terrarum et tenementorum* were omitted: whether it might be amended, 162, 163

### Emblements, 515.

### Enclosure, 432, 433.

### Endictment.

Where a person endicted is not convicted or acquitted, he may be arraigned upon a new endictment, 147  
Where the person endicted shews any exception in law, any one not assigned may be of counsel for him, 147  
Whether void by the outlawry of one of the jurors, 134, 147  
Where it shall be avoided for false Latin or want of form, 464, 465  
It cannot be found but by jurors of the county, although it be in a corporation whose liberty extends into two counties, 379  
Endictment for nuisances ought not to be quashed without a certificate that the nuisances be avoided or removed, 584  
Endictment for perjury ought to shew the cause of the perjury: but otherwise in an action for words concerning perjury, 322  
Endictment of trespass before justices of peace, and traversed; whether it may be tried the same day or sessions, 315. 340. 438. 439. 448, 449  
Endictment of forcible entry, upon statute of 8. *Hen 6. c. 9. in tythes*, 201  
Of a common barrator *contra formam diversorum statutorum*, 340  
For perjury, 352. 553  
For engrossing a great quantity of hay, and shews not what quantity, *viz.* loads or trusses, &c. is void for the uncertainty, 380, 381  
Endictment of seven-and-twenty persons for engrossing and selling together, 380, 381  
Endictment for scandalous speeches of a justice of the common pleas, 503  
Upon the statute of *Westminster 2. c. 46.* for throwing down inclosures of  
S f z improvements;



## TABLE OF CONTENTS.

|                                                                                                                                      |                         |
|--------------------------------------------------------------------------------------------------------------------------------------|-------------------------|
| improvements, and the proceedings thereupon,                                                                                         | 289, 281. 439, 440      |
| Upon the statute of 1. <i>Jac.</i> 1 c. 11. for taking a second husband, the first living,                                           | 461, 462, 463           |
| Upon the statute of 4. & 5. <i>Phil. &amp; Mary</i> , c. 8. for taking a maid against her will,                                      | 465                     |
| Upon the statute of 3. <i>Hen.</i> 7. c. 2. for taking a woman against her will and marrying her,                                    | 482, 483. 485. 489. 493 |
| Indictment of battery for abusing an infant under ten years of age in lying with her,                                                | 312                     |
| Indictment for robbing a chamber in an inn of court; and whether it may be said to be <i>domus mansionalis</i> of him who is robbed, | 473, 474                |
| For burning of his own house <i>ea intentione ad comburendum aedes alienas</i> ,                                                     | 376, 377                |
| Of an anabaptist, upon the statute of 35. <i>Eliz.</i> c. 1. s. 10.                                                                  | 593                     |
| Indictment for recusancy,                                                                                                            | 30. 504                 |

### Infant.

|                                                                                                                        |              |
|------------------------------------------------------------------------------------------------------------------------|--------------|
| What contracts, covenants, obligations, or other acts shall bind him,                                                  | 179. 502     |
| Whether he may be grantee of an office after an estate for life, <i>exercendum per se vel sufficientem deputatum</i> , | 279 556, 557 |
| Whether he shall avoid by error a recovery against his guardian, the judgment being by default of the vouchee,         | 307          |
| Infant executor takes the principal money upon a bond forfeited, and makes a release; whether it be good,              | 490          |
| Infant, lessee for years, takes another lease for the same term and the same rent, and with the same conditions, &c.   | 502          |
| Whether he shall be admitted to sue by guardian or by <i>prochein amie</i> ,                                           | 86. 161      |
| Ought not to be amerced,                                                                                               | 410          |
| What office he is capable of, &c.                                                                                      | 556. 557     |

### Enquisition and Enquests.

For preserving enclosed grounds upon

the statute of *Westminster* 2. 280, 281. 439, 440

### Enquiry of Damages.

Whether it ought to be by the jury after demurrer upon evidence, or by writ after judgment, 143

### Equity.

Whether an assignee in trust be chargeable with the receipt of his companion, 312  
Whether dower demanded against equity and the husband's agreement shall be recovered in a court of equity, 190, 191

### Error.

Whether it may be assigned against the record, 53  
Whether assigned against the record it be insufficient, although a demurrer be thereupon, 53  
Not to be assigned where it is for the ease or advantage of the party who would assign it, 437  
Because the judgment was *ideo in misericordia* or *ideo capiatur*, where it ought not to be; and where it is in other manner than it ought to be, 32, 340  
Where the verdict finds damages absolutely, upon part whereof is a demurrer, where it ought to have been generally and conditionally given upon the issue found; so merely cross, it is not amendable, 32, 33  
Whether error may be brought in the exchequer chamber of a judgment in the king's bench, in an action of *scandalum magnatum*, 142, 143  
Error, for that the court being created by patent, the process was awarded *secundum consuetudinem ville*, 143  
Error brought to reverse a judgment for preposterous and too prolix pleading, 164  
Whether error lies where judgment is entered against one defendant in trespass, and a *nolle prosequi* was entered before against the other defendant, 239

Error

# TABLE OF CONTENTS.

|                                                                                                                                                                                                                                                                                                                   |                     |                                                                                                                                                                                                                                                                                                       |                |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Error for giving day till the next court, without mentioning a day certain,                                                                                                                                                                                                                                       | 254                 | Error, because more jurors than twelve were in a writ of enquiry of waste,                                                                                                                                                                                                                            | 414            |
| Error for omission of a <i>capias</i> upon an indictment of recusancy, reversed for that cause,                                                                                                                                                                                                                   | 505                 | Error where writ is awarded to the coroners, where the sheriff is plaintiff or defendant,                                                                                                                                                                                                             | 345. 346       |
| Error, because the trial is by six jurors only, although it were alledged to be <i>secundum consuetudinem</i> ,                                                                                                                                                                                                   | 259. 260            | Where three executors sue, and the one is severed, and judgment given for the two who prosecute, whether it be error,                                                                                                                                                                                 | 420. 421       |
| Error where there were proceedings in an inferior court after an <i>habeas corpus cum causâ</i> delivered and allowed, how it shall be tried,                                                                                                                                                                     | 262                 | Error brought against three executors where one appeared and confessed the action and judgment, <i>quod recuperet debitum</i> against the three, and execution <i>de bonis testatoris, si tantum</i> , and damages <i>de bonis propriis</i> of him who appeared, and <i>misericordia</i> against all, | 564            |
| Error of a judgment in an inferior court, because the plaint differed from the style of the court,                                                                                                                                                                                                                | 572                 | Where the <i>venire facias</i> is against two defendants and the issue tried, whereas the one was dead before the <i>venire facias</i> awarded, whether it be error,                                                                                                                                  | 426            |
| Error of a judgment in battery against husband and wife, where the husband pleaded generally <i>not guilty</i> ; and <i>quoad</i> the wounding the husband and wife pleaded <i>not guilty</i> , and <i>quoad</i> the battery the wife pleaded a justification with an averment, <i>et hoc parata est, &amp;c.</i> | 594                 | Where justices of peace proceed to trial upon an indictment of trespass the same day that it is found and traversed, it is erroneous,                                                                                                                                                                 | 340. 438. 448. |
| Error of a judgment in the exchequer chamber, where it lies and where not,                                                                                                                                                                                                                                        | 286. 300            | Error of a judgment in an inferior court, because it was <i>ideo concessum est</i> , where it should have been <i>ideo consideratum est, &amp;c.</i>                                                                                                                                                  | 442. 443       |
| Error in the exchequer-chamber upon a judgment in a <i>scire facias</i> to have execution upon a judgment in the king's bench,                                                                                                                                                                                    | 246. 464            | Whether it be error in a judgment of waste, where it was assigned in cutting down twenty apple-trees, and the jury find the waste in cutting down two apple-trees, and no judgment of <i>ideo in misericordia pro residuo</i> ,                                                                       | 453            |
| Whether error lies for the principal and bail for an error <i>tam in iudicio quam in executione</i> ,                                                                                                                                                                                                             | 300. 408. 481. 574. | Error of a judgment in the common bench; if it may be reversed in part and affirmed in part,                                                                                                                                                                                                          | 471            |
| Brought by the principal and bail for an error in the principal judgment and execution against the bail, and therefore abated,                                                                                                                                                                                    | 574. 575            | Error brought here of a judgment given in Ireland, and reversed; how the proceedings shall be thereupon,                                                                                                                                                                                              | 511.           |
| If it lies for the bail for an error in the principal judgment and in the execution, or for the execution only,                                                                                                                                                                                                   | 481.                | Error lies not where judgment is entered against the defendant by default,                                                                                                                                                                                                                            | 517            |
| Brought by the bail for a judgment given against the principal,                                                                                                                                                                                                                                                   | 561                 | Error, because the judgment was <i>quod querens nil capiat per breve</i> , where it should be <i>nil capiat per billam</i> ,                                                                                                                                                                          | 580            |
| Where an infant suffers a recovery by his guardian, the judgment being by default of the vouchee,                                                                                                                                                                                                                 | 307                 | Error in part of an order cannot vitiate the whole order,                                                                                                                                                                                                                                             | 471            |
| Where judgment is given for all, where the tenant pleads but to part in a writ of right, and issue taken and tried thereupon,                                                                                                                                                                                     | 310. 311            |                                                                                                                                                                                                                                                                                                       | Escape.        |
| Whether it lies for the king upon an indictment of recusancy,                                                                                                                                                                                                                                                     | 505                 |                                                                                                                                                                                                                                                                                                       |                |
| Error to reverse a fine acknowledged;                                                                                                                                                                                                                                                                             | 415. 416            |                                                                                                                                                                                                                                                                                                       |                |

# TABLE OF CONTENTS.

## Escape.

Where it shall be where a prisoner goes at large with his keeper by colour of an *habeas corpus*. - 14. 466  
Whether the escape of one in execution be cause of discharge of the other debtor, - 74  
Escape and breach of prison, the difference, - 210

## Essoign.

How and when to be made by the judges - 13. 14. 200  
Ought not to be cast for the defendants or tenants, where they appear by attorney, - 511  
After one default and resummons, an essoign is not allowable, 341

## Estate.

There cannot be fraction of estates in deeds, - 548  
Estate contingent, by what act it shall be destroyed, 102, 103 364. 529  
Where an estate of inheritance shall be created by devise, 230, 447  
Estate limited to husband and wife in the *habendum* to the use of them and the heirs of their bodies; whether it be an estate tail, 230. 245  
Estate for life limited by express limitation, shall not be a higher estate by implication, - 367  
Estate upon surrender of a copyhold to the use of one for life; and for want of issue of his body, to the use of another and his heirs: what estate the first hath, whether for life only or not, - 367

## Estoppel.

Lease by indenture shall estop the party in pleading; but the truth being found by the verdict, the court ought to adjudge according to the truth, 110  
Where an estoppel may be against an estoppel, - 478

## Est stranger.

Whether a party named in a deed that doth not seal it, shall be counted a stranger unto it; and when he shall take advantage thereof, 289

## Exception.

Whether it may be after the limitation of an estate, - 437

## Exchequer. See Court.

## Excommunicato Capiendo.

How it ought to be made, 197. 199. 583  
Whether it shall be good, not being for any of the five causes mentioned in the statute of 5. *Eliz.* 197. 199  
Whether, being at the suit of the party, he shall be discharged by a general pardon in parliament, he not being excepted therein, - 199

## Execution.

Execution without satisfaction is no bar, 75  
Taken against one is no bar, but that he may sue the other, 75  
One taken in execution in *London*, and removed by *habeas corpus* into the king's bench, shall be committed there in execution for that debt, and having discharged all causes in the king's bench, shall be remanded, 128  
Whether it shall be awarded where the party, formerly taken rescued himself and escaped, 75. 109. 203. 240. 255  
It cannot be of a judgment in an inferior court by *certiorari* and *mittimus* thereupon, - 34  
What execution shall be taken forth against him, who, hanging the suit, is made a peer of the realm, 205. 206  
Execution upon a record of attainder of a felon removed out of another court, 176  
Upon



## TABLE OF CONTENTS.

Upon a *scire facias* by the husband,  
in a judgment in debt brought by him  
and his wife as administratrix, 464

### Executor.

Who may be an executor, 9  
Whether upon a non-suit he shall pay  
costs, - 29  
Whether he shall be charged in the *de-  
bet* and *detinet* in debt for rent, upon  
a lease for years made to the testator,  
arrear after his death, 225  
Whether he may distrain for a rent-  
charge granted by the testator for  
divers years, the years being deter-  
mined, - 471  
Whether an executor or administrator  
shall be enforced to find bail, upon  
the statute of 3. *Jac.* in a writ of er-  
ror, or shall have a *superfedeas* with-  
out bail, - 59  
Where an executor suffers a judgment  
in debt for a debt of the testator, and  
dies intestate; whether a *scire facias*  
lies upon this judgment against the  
administrator of the first man, 167  
Whether judgment shall be against an  
executor for the entire debt, where  
it is found that he hath assets but for  
part of the debt, - 167  
Whether an executor shall be charged  
in debt by a contract assigned by the  
commissioners of bankrupts, 187  
Where an executor or administrator  
shall be said to be assignee, 289  
How the authority of executors may be  
divided, - 293. 420  
What shall be said to be an assent of an  
executor upon a legacy, 293  
Whether he shall have an action against  
a sheriff for not returning a writ,  
and for what wrongs done *in vita*  
*testatoris*, - 297  
Where an executor shall be charged *de*  
*bonis propriis*, 518, 519. 526, 527.  
565  
Whether he may plead a statute for the  
payment of money at a day to come  
against a debt upon an obligation, 363  
Whether the executor of an obligee,  
being also executor to one of the  
obligors, may have debt against the  
surviving obligor, 372, 373  
Whether an executor, accepting the  
principal debt upon a bond forfeited,

and making a release, it shall be a  
*devastavit* for the residue, 490  
Whether executors shall have the next  
avoidance of a benefice granted unto  
their testator for life only, 505, 506  
Executor *de son tort*; whether charge-  
able where an administrator hath ful-  
ly administered the testator's goods,  
88, 89

### Exposition.

Of statutes, how to be made, 34. 83.  
84, 85. 533  
Of deeds, - 173. 548  
Of words, - 222. 393  
Of the words "*cum pertinentiis*," 17,  
18. 57. 169. 482  
*Firmum facere*, - 202  
Provided, - 128, 129  
*Si modo*, - 475, 476  
*Terdecem annos*, - 386  
*Quinginta* for *Quinquaginta*, - 259  
*Solvendo*, - 289  
*Catalla*, - 293  
*Repositorium*, - 555  
*Cum serq̄ appensā*, - 562

### Extent.

How goods extended before the *liberats*  
are bound thereby, - 149  
How to be made by the bailiff of a li-  
berty upon an *elegit*, 319  
Whether it may be awarded for a com-  
mon person against one who is in ex-  
ecution for debt to the king, 389.  
390  
Upon a statute staple; whether it may  
be by the sheriff when the party dies,  
after the *teste* of the writ and the in-  
quisition taken, 451, 452. 457, 458.  
459

### Extinguishment.

Where it shall be of a way by unity of  
possession, - 418. 419  
Parson, patron, and ordinary, before 13.  
*Elix.* made a lease for ninety-nine  
years (there being a former grant of  
the next avoidance); the parson  
dies; the grantee presents an incum-  
bent, who avoided the lease; it is  
thereby totally extinguished as to his  
successor, - 582  
Extortion,

# TABLE OF CONTENTS.

Extortion, 438. 448, 449.

## F.

### False Imprisonment.

Where one is arrested on a *capias* and the writ not returned at the day, 446, 447

### Fees.

What fees sheriffs shall take for serving executions, 286, 287

### Felony.

Whether the burning of a man's own house maliciously to burn the houses adjoining be felony, 376, 377, 378  
Whether it be felony in a soldier to depart from his conductor without licence - 71  
Where felony committed in one county may be tried in another adjoining county, and where nor, 247, 248  
Whether it be felony in a woman divorced to take a second husband, the first living, 461, 462, 463  
Where one attempts to break open a house with an intent to commit burglary or to kill any therein, and a stranger within the house kills him, it is no felony, 544

### Feme.

What shall be said to be forcible taking a maid against her will, 488, 489  
*Feme sole* recovers in an action, and before day *in banco* takes *baron*, shall have her judgment, 232  
*Feme sole* merchant, how to be sued, 68, 69  
*Feme covert*, where she shall be prejudiced in her inheritance by her husband's act, 7  
Whether, if sued with her *baron*, she may appear, to avoid imprisonment, &c. 58, 59  
Cannot be charged with her husband

for conversion of goods to the use of them, 254, 494, 495, 519  
What goods a *feme covert* may have, 519, 554  
*Feme* obligee takes one of the obligors to husband, it is a discharge of all the obligors, 551  
Join with her husband in a letter of attorney to deliver a lease, 165  
To what intents she may make a will, and where the husband is tied to perform it, 219, 220, 376, 597  
*Feme* divorced takes a second husband, the first living; whether it be felony, 461, 462, 463  
See tit. *Baron & Feme*.

### Fieri Facias.

Husband and wife executrix sued in debt, and upon judgment and *fieri facias*, *nulla bona* being returned, the plaintiff procured a new *fieri facias*, & *quod scire facias* to the defendants to be in court such a day, who then appeared and demurred upon the writ; which being adjudged good, and that they should answer, they imparling, judgment was given by *nihil dicit*, that the plaintiff should have execution *de bonis propriis*, 518, 519, 526, 527, 528

### Fines and Lands, 524, 525.

What shall bar the heir in tail, 434, 435, 543  
Fine and non-claim, what actions it bars, and who may take advantage thereof that hath nothing in the land, 110, 156, 200, 201, 576, 577  
Fine with proclamations, at what time and by whom they shall be avoided, 156, 157, 200  
With proclamations and five years passed, whom it shall bar, 576, 577  
With proclamation to the heir, who enters during the nonage of the devisee, and nonclaim within five years; whether it shall bind the devisee, 200, 201  
Levied by *J. S.* uncle of *A.* an idiot, who was seised of the inheritance (the said *J. S.* dying in the life of *A.*) shall not bar the grandchild of the said *J. S.* 524  
Fine levied by the disseisee to a stranger,

## TABLE OF CONTENTS.

|                                                                                                                                                                     |                    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| ger, where it shall enure to the benefit of the disseisor,                                                                                                          | 303. 305. 483, 484 |
| Levied by a disseisee to a stranger not knowing of the disseisin; how it shall enure,                                                                               | 484                |
| Levied by the eldest son, heir in tail, who dies without issue in the life of his father, tenant in tail; whether his younger brother shall be barred by this fine, | 434. 435           |
| Levied by him who occupies in trust and hath the inheritance and non-claim; whether it shall bar his lease for years,                                               | 110                |
| Whether it may be levied of a place known without mentioning of any vill or hamlet; where it lies,                                                                  | 219. 269. 276      |
| <i>Quod partes finis nihil babeuntur,</i>                                                                                                                           | 514. 524           |

### Fines assessed in Courts.

|                                                                                                |          |
|------------------------------------------------------------------------------------------------|----------|
| Assessed by judgment openly in Court, cannot be qualified,                                     | 251      |
| How they shall be assessed in judgments upon informations,                                     | 251      |
| Assessed for trespass in a forest, may be levied by process in the king's bench,               | 409. 410 |
| Assessed by the high commissioners, how to be levied,                                          | 113. 114 |
| Imposed upon an attorney for prosecuting actions without suing original writs,                 | 74       |
| Imposed upon an attorney for falsifying and forging a writ of <i>capias</i> ,                  | 74       |
| Imposed upon a clerk for entering and certifying a too prolix record in abuse of the subjects, | 164      |
| For amending record before and without direction of the court,                                 | 278      |
| For a misprision in a record,                                                                  | 278      |
| Fine not imposed, <i>quia pauper</i> ,                                                         | 74       |

### First-Fruits and Tenths.

|                                                    |     |
|----------------------------------------------------|-----|
| The books of the valuation of them, when composed, | 456 |
|----------------------------------------------------|-----|

### Foldcourse.

|                                      |     |
|--------------------------------------|-----|
| Whether a foldcourse may be divided, | 432 |
|--------------------------------------|-----|

### Forcible Entry.

|                                                                                                                      |          |
|----------------------------------------------------------------------------------------------------------------------|----------|
| Indictments upon the statute of 8. <i>Hen.</i> 6. of forcible entry in tythes,                                       | 201      |
| Whoever is owner of the soil may enter lawfully and detain with force against any who pretends to have common there, | 488. 489 |

### Forfeiture.

|                                                                                                                            |          |
|----------------------------------------------------------------------------------------------------------------------------|----------|
| What shall be forfeiture of a jointure within the statute of 11. <i>Hen.</i> 7.                                            | 244      |
| By the husband of his copyhold in right of his wife; where it shall bind the wife and her heirs after the husband's death, | 7        |
| Whether a copyhold may be forfeited by making a lease thereof for one year without the lord's licence or special custom,   | 233. 234 |
| Whether it may be forfeited for not paying the set fine,                                                                   | 196      |

### Forest.

|                                                                                                                                              |          |
|----------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Where the justices seats are to be held in forests,                                                                                          | 409. 410 |
| How fines, in justices seats in forests assessed, may be levied,                                                                             | 409. 410 |
| Whether forest lands purchased from the king, which were exempted from payment of tythe, shall be discharged in the hands of the purchasers, | 94       |

### Franchises and Liberties.

|                                                   |        |
|---------------------------------------------------|--------|
| How they may be destroyed or determined in parks, | 59. 60 |
| Where they shall be seized for abusing them,      | 253    |

### Franktenement.

|                                                                                                    |     |
|----------------------------------------------------------------------------------------------------|-----|
| Where it may be granted by copy,                                                                   | 200 |
| Whether he shall be said to have a franktenement who hath <i>primam tonsuram</i> only in a meadow, | 362 |

### Fraud. See Collusion.



## TABLE OF CONTENTS.

### G.

#### Gavelkind Land.

Its properties and customs, 584. 561, 562

#### Grants.

Grants of land and common ; whether it shall be intended to be in gross or appurtenant, - 300, 301  
 - Of a rent ; whether it shall be by the words *reddendum & solvendum* in an indenture of lease, - 288, 289  
 There cannot be a grant of an inheritance *in futuro*, - 448. 547  
 Of a term, *habendum* after the death of the grantor ; it is an immediate grant and a void *habendum*, 155  
 Of the next avoidance of a church unto one during his life ; whether his executors after his death shall have it, - 505, 506  
 None may entitle himself to any copyhold, but he must shew a grant thereof, - 190  
 The addition of a falsity in a deed or grant shall never prejudice where there was any certainty before, 548  
*See tit. Deeds.*

#### Grants of the King.

Where it shall be void for non-recital or mis-recital of a former grant thereof, and where a *non-obstante* shall help it, - 198. 548  
 Where an office is found for the king by commission under the great seal ; where the king's grant shall be good, and where not, 172, 173  
 Of a messuage and land appertaining thereto ; how it shall be construed, and what lands in the king's case shall be said to be appertaining, 21, 22  
 Where there is a falsity in point of prejudice to the king's benefit or a misinformation of the king's title, or upon a false suggestion, there all grants made by the king shall be void, 548

### H.

#### Habeas Corpus.

In an *habeas corpus* the return of the

cause of the commitment of the prisoner ought to be certain, 133. 558,

559. 593  
 If no cause of commitment be returned in the *habeas corpus*, the prisoner shall be discharged by bail, &c. 507.

*Habeas corpus* and *certiorari* to remove 552  
 a prisoner attainted for felony in another county, and judgment to have execution given in the king's bench, 176

To remove a prisoner in execution ; how and in what manner he ought to be used, and where it shall be an escape under colour thereof, 466

For a prisoner committed by the lords of the council, and returned thereupon, - 133. 168. 579

To remove a cause, and the proceedings thereupon, out of an inferior court, - 261

Upon *habeas corpus*, prisoners discharged without bail, 569. 570

*Habeas corpus* by one who was committed by order of the exchequer for not paying a fine imposed upon him by the ecclesiastical commissioners, 579. 582

#### *Habendum.*

Where repugnant to the grant, how to be construed, - 155. 400

To one, to the use of another and his heirs, whether this limitation of the use gives more than the estate for life, 230. 245

#### *Habere facias Possessionem.*

How to be awarded into Ireland, 512

#### Hariots.

Whether he who demands an hariot, and demands thereupon, ought to shew the kind of beast, and the price thereof, - 260

#### Heir.

The words in a will which disinherit an heir ought to have an apparent intent, - 369. 450  
 How

## TABLE OF CONTENTS.

|                                                                                                                                                 |                    |                                                                                                                           |          |
|-------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|---------------------------------------------------------------------------------------------------------------------------|----------|
| How the heir shall be charged, where he denies the deed to be his father's,                                                                     | 336, 337           | Where the declaration is variant from the original writ,                                                                  | 347      |
| How he shall be charged in a <i>scire facias</i> upon a recognizance of his father's,                                                           | 295, 296, 312, 313 | <i>See more in Statutes.</i>                                                                                              |          |
| Whether he shall have the rent, where the lessee covenants to pay the rent to the lessor, his heirs, and assigns,                               | 207                | <b>Implication.</b>                                                                                                       |          |
| Upon a mortgage for the payment of money, performed by the daughter; a son is afterwards born; whether the son or daughter shall have the land, | 87                 | Where it shall increase an estate, and where not,                                                                         | 367      |
| <b>Honour.</b>                                                                                                                                  |                    | <b>Imprisonment.</b>                                                                                                      |          |
| Where an honour consists of several manors, how the courts of the manors are to be holden,                                                      | 367                | Where it shall be appointed by the commissioners for ecclesiastical causes, and where not,                                | 114      |
| <b>Hostler and Innkeeper.</b>                                                                                                                   |                    | Imprisonment during life is not usually awarded but where there is an awarding of forfeiture of lands during life,        | 504      |
| May detain the horses of his guests for non-payment of their pasturage; but so cannot a private man,                                            | 271, 272           | None may stay or imprison any without an officer, unless in felony,                                                       | 235      |
| Whether an inn-holder is within the statute of bankrupts,                                                                                       | 549, 550           | <i>See more in Prison and Prisoners.</i>                                                                                  |          |
| <b>Hue and Cry.</b>                                                                                                                             |                    | <b>Inducement.</b>                                                                                                        |          |
| When and how it shall bind,                                                                                                                     | 37                 | What certainty an inducement to a plea ought to have,                                                                     | 138      |
| Whether it may be made in the adjoining hundred,                                                                                                | 37, 41, 379, 442   | Inducement to a traverse ought always to be sufficient in matter,                                                         | 336      |
| <b>Highway.</b>                                                                                                                                 |                    | <b>Infant. See Enfant.</b>                                                                                                |          |
| Inclosed, an information brought thereupon,                                                                                                     | 184, 185, 266, 267 | <b>Information.</b>                                                                                                       |          |
| <b>I.</b>                                                                                                                                       |                    | Against an under-sheriff for several crimes and misdemeanors,                                                             | 566, 567 |
| <b>Jeofail.</b>                                                                                                                                 |                    | For non-residency before justices of assize,                                                                              | 146      |
| Where it is aided in the king's suit,                                                                                                           | 312                | Upon a penal statute; where it may be in <i>London</i> , or in an inferior court,                                         | 112, 146 |
| In a <i>dispositum</i> in dower,                                                                                                                | 301                | Against the mayor and commonalty of <i>London</i> , for suffering offenders to escape, who had committed murder publicly, | 252      |
| Where the recital of the bills is in <i>placito transgressionis</i> , and the declaration is in an action upon the case,                        | 325                | For a riot and rescous,                                                                                                   | 251, 252 |
|                                                                                                                                                 |                    | For inclosing an highway,                                                                                                 | 266, 267 |
|                                                                                                                                                 |                    | Where it shall be good for the king, where it is ill for the party who informs for the king and himself,                  | 331      |
|                                                                                                                                                 |                    | Information brought in the king's bench for misdemeanors,                                                                 | 579      |
|                                                                                                                                                 |                    | Where informations are brought upon a penal statute, where part is given to the king and part to the prosecutor, there    |          |

## TABLE OF CONTENTS.

there it ought to be *qui tam pro domino rege*, &c. otherwise it is where the king is only named as an offence against him, 336  
 Information for the king, the city of London, and himself, against a currier, - 588, 589  
 Informers, how to be sworn, and to have the moiety, &c, - 316

### Ingrossing.

What shall be said to be ingrossing and within the statute of 5. *Edw.* 6. 231, 232. 314, 315

**Innkeeper.** See *Hofstler*.

**Inrollment.** See *Relation*, and *Bargain and Sale*.

**Institution and Induction**, 354, 355, 356, 357.

Under what seal it may be, 342  
 Trial of institution shall be by the bishop: of induction, *per pais*, 380  
 Without a presentation, is void, 99  
 See more in *Quare Impedit*.

### Intendment.

Where it shall make a declaration and plea good, 6. 63, 64. 80. 195. 221. 272. 301. 387. 341. 363. 383. 386. 392. 401. 413. 426. 458. 461. 472. 497-539-555.  
 Where it shall make a sheriff's return good, - 189  
 It shall be taken according to the common parlance, 192. 216. 510  
 It ought to be construed according to the rules of law and reason, 413  
 Intendment shall not make a replication good, - 80. 94  
 Where the condition of a bond shall be made good by intendment, 226

### Joinder in Action.

Where it may be by the king and a common person, - 256, 257  
 Where it ought to be by *baron* and *feme*, - 419. 437, 438  
 In *audita querela* by three, where one

only was taken in execution, 443, 444

### Joint-Tenants.

Devise of lands to three, part and part alike; whether they be joint-tenants or tenants in common, 75  
 Action, real, brought against joint-tenants or coparceners; the death of one of them shall abate the writ, 574. 583

### Jointure.

What shall be said to be a jointure within the statute of 11. *Hen.* 7. 244

### Ireland.

How *habere facias possessionem* shall be awarded into Ireland, - 512  
 Whether a prohibition lies for a thing done there, - 264

### Issue joined.

Where it shall be found for him who pleads, when it is found in substance but not in words, - 148  
 Upon payment made 31 *September*, 78  
 Tried upon an ill and void plea; how it shall be good, - 25  
 Whether it shall be an issue, and may be well tried when it is in the affirmative without a negative, and the conclusion is *et de hoc ponit se super patrium, et querens similiter*, 80. 316, 317  
*Quod ipsi non sunt culpabiles* in an action against the husband for the wrong done by his wife, - 417  
 Although the plaintiff joineth issue upon a defective plea, yet having a good declaration, and found for him, judgment ought to be given for him, 25

### Judgment.

Where judgment shall be *ideo in misericordia*, and where *ideo capiatur*, 32 178 551  
 Where the defendants are found severally guilty for several causes and several damages given, judgment that one of them be *in misericordia*, and that



# TABLE OF CONTENTS.

|                                                                                                                                                                                                                              |                  |                                                                                                                                                                                  |               |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| that one <i>misericordia</i> be against the plaintiff, where the defendants are severally found <i>not guilty</i> for part,                                                                                                  | 54, 55           | Judgment reversed in debt, because the defendant pleads payment of 2 l. 6s. 8d. and the plaintiff saith, <i>non solvit</i> the said 5 l. 6s. 8d. and so there was not any issue, | 593           |
| Where the defendant, after imparlance, pleads outlawry, and, upon <i>non tiel record</i> pleaded, fails of the record, judgment shall be absolutely given, and not a <i>respondes ouster</i> ,                               | 566              | Where it shall be for the plaintiff after verdict for him, although there be no original writ nor bill filed,                                                                    | 281, 282      |
| Husband and wife sue in trespass; the husband dies betwixt the day of <i>nisi prius</i> and the day <i>in banco</i> , no judgment shall be entered,                                                                          | 509              | Where it may be reversed for part, and affirmed for part,                                                                                                                        | 471           |
| Judgment against husband and wife executrix, by <i>nihil dicit</i> , to have execution <i>de bonis propriis</i> , 518, 519.                                                                                                  | 526, 527, 528    | Judgment to reverse a judgment in an inferior court, in a <i>formedon</i> given for the defendant; the plaintiff's declaration being ill, how it shall be given,                 | 444, 445      |
| Judgment against husband and wife <i>quod capiantur</i> in trespass, where the husband is acquitted,                                                                                                                         | 506, 507         | How it shall be where tenant by receipt makes default,                                                                                                                           | 263, 264      |
| <i>Et e contra</i> ,                                                                                                                                                                                                         | 513              | Judgment against an attorney who falsely demeaned himself,                                                                                                                       | 78            |
| Judgment against an infant, <i>quod non fit in misericordia</i> ,                                                                                                                                                            | 410              | Against one who offered himself as a subsidy-man to be bail, and so did swear that he was, and afterwards confessed it to be false,                                              | 148           |
| How it ought to be given in a writ of right,                                                                                                                                                                                 | 310, 311         | Against one for publishing a libel,                                                                                                                                              | 175           |
| How it shall be where several damages are found against several defendants,                                                                                                                                                  | 54, 55, 192, 193 | Against one for scandalous speeches used to a judge sitting in court,                                                                                                            | 504           |
| Given for the plaintiff, where the issue is found for him upon an idle and void plea,                                                                                                                                        | 25               | Against one for striking in <i>WESTM. HALL</i> , <i>sedentibus curiis</i> ,                                                                                                      | 374           |
| Erroneous, because it was <i>ideo concessum est</i> ,                                                                                                                                                                        | 442, 443         | Of the pillory and fine for riot in a recess,                                                                                                                                    | 506, 507      |
| Against an executor, when it shall be of the entire, where assets is found but for part of the debt,                                                                                                                         | 167              | Judgment against one for cheating with false tokens,                                                                                                                             | 564           |
| Against an executor or administrator for costs,                                                                                                                                                                              | 219              | Judgment upon an indictment for taking a child under the age of ten years, although the party did not ravish or carnally know her,                                               | 332           |
| Against an heir, where he pleads a false plea which lies not in his conscience,                                                                                                                                              | 436, 437         | Judgment upon an indictment upon the statute 31. Hen. 8. c. . for taking a maid inheritrix forcibly, and marrying her, &c.                                                       | 484, 488, 492 |
| Judgment reversed in an <i>ejedione firme</i> , because the declaration was of a messuage and forty acres of land, meadow and pasture, and do not distinguish how much of every one,                                         | 179, 573         | For burning his own house in a city voluntarily, to the intent to burn the adjoining houses,                                                                                     | 378           |
| Judgment reversed, because it appeared by the declaration that the action was brought before there was any cause of action,                                                                                                  | 575              | In treason, for counterfeiting coin, what it shall be,                                                                                                                           | 383           |
| Judgment reversed in the common pleas, because an attorney there brought his action by a bill of privilege; and the judgment was, <i>quod querens nihil capiat per breve</i> , where it should have been <i>per billam</i> , | 580              | In treason, upon the statute 25. Edw. 3. c. 2. for speaking traitorous words against the king,                                                                                   | 332, 333      |
|                                                                                                                                                                                                                              |                  | Upon every conviction in indictments the judgment ought to be <i>quod capiatur</i> ,                                                                                             | 505           |

## Judges and Justices.

Chief Justices of the king's bench, how made and amoved, 52. 65. 225 403  
Removed,

## TABLE OF CONTENTS.

**K.**

# TABLE OF CONTENTS.

## K.

### King.

- Whether the king may enter into warranty as vouchee by the attorney general; and how a remainder in tail in him may be barred by barring the remainder over, - 96, 97
- Where the king may take advantage of a condition broken without office, and where not, 99, 100. 172, 173
- Where the king and a common person may join in action, 256, 257. 336
- The king may waive a demurrer or issue, but not any other person without the attorney general consents, 347
- The king may present to any church which he hath in right of wardship, either under the great seal, or under the seal of the court of wards, 99, 100
- May try his issue at the bar or by *nisi prius*, at his pleasure, - 247
- The king shall never render in value upon voucher, - 97
- A common person shall not have execution against the king's debtor until agreement for the king's debt, 390
- The omission of a clerk shall not prejudice the king, - 349
- Whether error lies for the king upon an indictment of recusancy, 504
- Whether a successor king may take advantage of a lapse incurred in the time of his predecessor, 335, 336
- Where a freehold may pass from the king without a patent under the great seal, - 513
- Where title appears for the king, the court, *ex officio*, ought to award for him, 590, 591, 592

## L.

### Lapse.

- Where it shall incur, - 357
- See more in *Quare Impedit*.

## Leases.

- Lessee for years assigns over his lease in trust for himself, and after purchasing the inheritance and occupies the land, and levies a fine with proclamations; whether this interest be barred, the trustee not claiming his lease within five years, - 110
- Where one covenants and grants that J. S. shall enjoy such lands for six years, and J. S. covenants to pay annually such a sum unto him; whether this be a lease for years, 207
- Lease for years by indenture by him who hath nothing therein; whether it shall bind, being found by verdict, 110
- Whether a lease for years may be devised to one and the heirs of his body, with remainders over, and shall be good by way of limitation, 230
- Lease *HABENDUM à die datûs indenture* for life, with letter of attorney to make livery after the day, and livery is made accordingly; whether it be a good lease, - 99
- If the lessor sell the trees, living the tenant for life, and the tenant for life cut them down, whether the vendee shall have *trover and conversion*, 274
- Whether the lessor may have *trover and conversion*, when a stranger, during the lease for years, cuts down and carries away timber trees, 242, 243. 274
- Lessee for years assigns over his term, and the lessor accepts of the assignment; the lessor notwithstanding may still maintain his action of covenant against the lessee for a condition broken by the assignee, 187. 580
- Lessee for years, upon condition that he shall not alien any part above three years during the term, and if he do, that the lease should be void; who lets for three years, and so from three years to three years, during the term of his life; whether this be a breach of the condition, 511, 512
- Lease for years, upon condition that he shall not alien above three years during the term, *ut supra*; who lets *ut supra*; the lessor accepts the rent of the assignee at a day after: whether



## TABLE OF CONTENTS.

|                                                                                                                                                                                                                                               |               |                                                                                                                                                                                                                                    |                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| ther this acceptance makes the lease good, &c.                                                                                                                                                                                                | 511, 512      | upon the land; whether it is void or voidable only by the wife,                                                                                                                                                                    | 185                |
| Lease for years, to begin after a former lease determined, which is misrecited; <i>quare</i> , when the last lease shall commence,                                                                                                            | 398, 399, 400 | See more in Leases and Livery and Seisin.                                                                                                                                                                                          |                    |
| Lease for years by deed is raised in a material part by the lessee after the delivery; whether the interest and term be determined and void as well as the deed,                                                                              | 399           | Libels, 175.                                                                                                                                                                                                                       |                    |
| Lease by a bishop by indenture, reserving the ancient rent (but mentions not any rent certain, nor lets not all the manor together, which was usually demised under one rent), is a void reservation, and a void lease against the successor, | 95            | Liberate.                                                                                                                                                                                                                          |                    |
| What shall be a good lease within the statutes of 32. Hen. 8. c. . and 13. Eliz. c. .                                                                                                                                                         | 22, 23        | Whether it may be by an administrator upon an extent sued by the executor,                                                                                                                                                         | 451, 452           |
| Lease made by parson, patron, and ordinary, being avoided by the next incumbent, dischargeth all his successors,                                                                                                                              | 84, 85        | Whether the sale of the goods of a bankrupt by the commissioners to another of them be good after <i>liberate</i> ,                                                                                                                | 149, 150           |
| Lease for years by husband and wife of the lands of the wife; whether void or voidable,                                                                                                                                                       | 22, 185       | See tit. <i>Execut.</i>                                                                                                                                                                                                            |                    |
| By husband and wife, of the lands of the wife, <i>HABENDUM</i> from <i>Michaelmas</i> for life, and livery is made after <i>Michaelmas</i> ; whether it be good,                                                                              | 171           | Licence.                                                                                                                                                                                                                           |                    |
| Lease for one-and-twenty years, rendering the ancient rent, by the husband only, of the land whereof he is joint-tenant with his wife in fee; whether it shall bind the wife,                                                                 | 22, 23        | To inclose an highway, when and how it ought to be obtained,                                                                                                                                                                       | 266, 267           |
| Leased for years by husband seised in right of his wife, or by tenant by the courtesy, is void by his death, and not voidable,                                                                                                                | 398, 399      | Limitation of Estates.                                                                                                                                                                                                             |                    |
| Lect.                                                                                                                                                                                                                                         |               | What shall be said to be a limitation of an estate, and what a condition,                                                                                                                                                          | 230, 231, 367, 577 |
| Where it may be within another leet, and the difference betwixt a leet and a toun,                                                                                                                                                            | 75, 76        | Limitation of an estate upon a possibility after a possibility, is void,                                                                                                                                                           | 577                |
| Whether for amerciamment in leets and court barons upon a distress, damages and costs ought to be given to the avowant.                                                                                                                       | 533, 534, 535 | Limitation of Actions, 115.                                                                                                                                                                                                        |                    |
| Letter of Attorney.                                                                                                                                                                                                                           |               | See more in Statutes.                                                                                                                                                                                                              |                    |
| By husband and wife, to deliver a lease                                                                                                                                                                                                       |               | Livery and Seisin.                                                                                                                                                                                                                 |                    |
|                                                                                                                                                                                                                                               |               | By an attorney upon a lease for life <i>à dis datis</i> , made the same day of the date, is a void lease and livery,                                                                                                               | 94, 95, 388, 389   |
|                                                                                                                                                                                                                                               |               | London.                                                                                                                                                                                                                            |                    |
|                                                                                                                                                                                                                                               |               | Where a custom there may be pleaded against a statute,                                                                                                                                                                             | 347, 361           |
|                                                                                                                                                                                                                                               |               | How the customs there are to be certified into other courts,                                                                                                                                                                       | 516, 517           |
|                                                                                                                                                                                                                                               |               | One taken in execution in <i>London</i> , and removed by <i>babeas corpus</i> into the king's bench, shall be committed there in execution for that debt, and having discharged all causes in the king's bench, shall be remanded, | 128                |
|                                                                                                                                                                                                                                               |               | Custom                                                                                                                                                                                                                             |                    |

## TABLE OF CONTENTS.

|                                                                                                                     |                    |                                                                                               |               |
|---------------------------------------------------------------------------------------------------------------------|--------------------|-----------------------------------------------------------------------------------------------|---------------|
| Custom for a <i>feme covert</i> merchant there,                                                                     | 68, 69             | by force, it is a marriage within the statute of 3. <i>Hen.</i> 7.                            | 448           |
| Custom that one being apprentice and made freeman may use any trade,                                                | 347. 361. 516, 517 | Whether a woman divorced from her husband, and marrying a second in his life, be a felon, &c, | 461, 462, 463 |
| Custom that every citizen and freeman of London may devise his lands in mortmain,                                   | 248. 576           | Fine to the king for inveigling one, being drunk, to marry in the night, &c.                  | 557           |
| Custom that the wife shall have the moiety of the goods whereof her husband died possessed,                         | 344. 345           |                                                                                               |               |
| An action may be maintainable in London, which is not actionable in the courts at <i>Westminster</i> ,              | 350. 387           |                                                                                               |               |
| Where and how wills of land in London are to be proved,                                                             | 396                |                                                                                               |               |
| Aldermen of London, their privileges,                                                                               | 585                |                                                                                               |               |
| Why the archbishop of <i>Canterbury</i> never makes any visitation in London diocese,                               | 340                |                                                                                               |               |
| An act of parliament for the relief of poor citizens and freemen of London, being sued there under forty shillings, | 572                |                                                                                               |               |
| Custom for the payment of tithes for houses in London, and where the suit shall be,                                 | 596                |                                                                                               |               |

### M.

#### Maintenance.

|                                                                                                                     |          |
|---------------------------------------------------------------------------------------------------------------------|----------|
| Whether it be maintenance for an attorney to solicit another's business in another court than where he is attorney, | 107. 160 |
| Information upon the statute of maintenance,                                                                        | 232, 233 |

#### Manor.

|                                                                                                         |     |
|---------------------------------------------------------------------------------------------------------|-----|
| What it is, and what shall be reputed parcel thereof, and what time is sufficient to gain a reputation, | 308 |
|---------------------------------------------------------------------------------------------------------|-----|

#### Marriage.

|                                                                              |           |
|------------------------------------------------------------------------------|-----------|
| If a woman be violently taken away and married, although she assents thereto | CRO. CAR. |
|------------------------------------------------------------------------------|-----------|

#### Marshal of the King's Bench.

|                                                                               |          |
|-------------------------------------------------------------------------------|----------|
| The office thereof not grantable for years,                                   | 587      |
| The prison of the king's bench is not any local prison confined to one place, | 210. 466 |

#### Messuage.

|                                                                        |    |
|------------------------------------------------------------------------|----|
| What land passeth by the grant of a messuage <i>cum pertinentiis</i> , | 17 |
|------------------------------------------------------------------------|----|

#### Misnomer.

|                                                                  |               |
|------------------------------------------------------------------|---------------|
| Of a corporation, where it shall make the deed void,             | 160           |
| Of a juror in his christian name, whether aided by the statutes, | 202, 203. 564 |

#### Misprision. See Amendments.

#### Mis-recital.

|                                                                    |                    |
|--------------------------------------------------------------------|--------------------|
| Of a statute, <i>quid operatur</i> ,                               | 135, 136. 232      |
| Of the king's patents, where it shall make them void,              | 197, 198           |
| Of a former lease, <i>quere</i> when the second lease shall begin, | 397, 398. 400. 502 |

#### Mis-return of the Sheriff, 223, 224.

#### Mis-using of Process.

|                                                 |        |
|-------------------------------------------------|--------|
| Where aided by the statute of <i>Jessails</i> , | 90, 91 |
|-------------------------------------------------|--------|

#### Mis-trial.

|                                       |                                 |
|---------------------------------------|---------------------------------|
| What shall be said to be a mis-trial, | 17. 20. 202, 203. 275. 284. 480 |
| Where                                 |                                 |

T t

## TABLE OF CONTENTS.

Where it shall be by mis-naming a juror, 202, 203  
 Where twenty-three are only returned upon the *venire facias*, and twenty-four in the *habeas corpus*, and the twenty-fourth juror not returned was sworn, whether it be aided by the statute of *Jeofails*, 278  
 Where it is not aided by any of the statutes, 284

### Monastery.

Whether monasteries dissolved by the statute of 27. Hen. 8. which were freed from the payment of tithe, be within the equity, &c. 422-425

### *Monstrans de Faits.*

He who comes in by act of law, needs not shew the deeds of his estate, 209  
 Where upon a deed of covenant to raise an use out of a particular estate to which he is not party, and yet claims by that deed, whether he may plead the said deed without shewing it, and where it ought to be shewn, 441, 442  
 Where the obligation shall be shewn by him who is assignee from the commissioners of bankrupts, 209

### Mortgage.

Devise of all his goods and mortgages to his executors, is a good devise of the lands mortgaged, 37  
 Devise of his lands in *A.* and *B.* to several persons and their heirs, and all the rest of his goods, leases, estate, and mortgages, &c. whereof he was possessed, to his wife, whom he makes executrix, an estate for life only passed, 447-449, 450  
 Upon a mortgage, a daughter performs the condition to pay the money, a son is born after; whether the daughter may retain, or that the son may oust her, 47

### Mortuary.

Whether a prohibition lies for suing for a mortuary in the ecclesiastical court, 237, 238

### Murder.

What shall be said to be murder, 531, 537, 538  
 To kill an officer which comes to arrest one, although he useth not the words of arrest, nor shews his warrant, is murder, 68, 183, 537, 538  
 The often striking and killing one who makes no resistance is murder, 131

## N.

### Name.

Name of dignity accepted by the plaintiff, hanging the writ; whether it be cause to abate it, notwithstanding the statute of 1. Edw. 6. 104  
 Name of dignity of a baron descended upon one who is sued by the name of knight; what remedy he hath that execution shall not be awarded against him but as against a peer of the realm, 205, 206  
 Name of dignity of baronet omitted whether it be cause to abate the writ and within the statute of 1. Edw. 6. 371, 372  
 Name of corporations mistaken, 57  
 Name of a juror mistaken, by what statutes aided, 202, 203  
 Whether a sheriff ought to add his name of office to returns, 189, 190, 570, 571  
 Where letters patents name lands by another name than when they came to the king, yet by a name certain *quid inde operatur*, 168, 169

### *Nolle Prosequi.*

Whether it may be entered against a defendant, and judgment pro against the other, 238, 239

### *Non Obstante.*

Whether a *non obstante* of a non-rec



## TABLE OF CONTENTS

or mis-recital of a former grant in the king's patent shall aid the grantee or not, 198

### Nonfuit.

Upon record of a *nisi prius* roll varying in substance from the plea roll, and a new *venire facias* awarded, agreeing with the plea roll, 203, 204

### Notice.

When and to whom it ought to be given, 34, 35, 132, 133, 574, 577  
Where it ought to be taken upon peril, &c. 392, 393  
Of a bye-law, when and how it ought to be given, 498

### Nul Tiel Record.

Pleaded, 297, 298, 565

### Nuisances.

Whether the erecting of a gate upon the highway to open and shut with the hand, be a nuisance, 184, 185  
Whether every one may abate a nuisance upon the highway, 184, 185  
Erecting of a tallow-furnace, &c. a nuisance, 510  
Nuisances ought to be certified into the court that they are abated or avoided, before the indictment shall be quashed, 584

## O.

### Oath.

Where an oath may be enlarged by direction of state for the executing an office, without an act of parliament, 26

### Obligation.

Obligation with a condition and a bill obligatory, the difference, 515

Shall not be void by vitious writing, 416, 418

Obligations and bills obligatory, how they differ, 515

Obligation general for the performance of covenants doth not alter the nature of rent, but that it ought to be demanded, 76, 77

Obligation with condition for performance of a simoniacal contract is void, 361, 425, 426

With a condition to resign a benefice upon request; whether the condition be simoniacal and makes the obligation void, 180

With a condition to pay upon the 31st of September, payment is pleaded to be at the day and the verdict found there was no payment the said 31st day, 78

With a condition for the payment of money at a day; how it shall be discharged by acceptance of another bond before the day or after, 83, 86, 193

With a condition that the husband shall suffer his wife to enjoy the goods of her first husband without claim; what shall be said to be a breach thereof, 204

By the husband, with a condition to suffer his wife to make a will; whether it shall bind him, and what will the wife in such case may make, 219, 220, 597

With a condition where it shall be good, according to the intention of the parties, though not according to the words, 219, 220

With a condition, where it shall be taken according to common parlance, &c. 226

Whether an obligation may be taken by a sheriff, 287

Obligation, "*quinginta*" for "*quin-*  
"*quaginta*," 416, 417

### Occupancy, 477.

### Offices and Officers.

Officer and judge, where one may be, 138

Where an officer shall be punished, although what he doth is by warrant from a justice of peace, 395

By

## TABLE OF CONTENTS.

of the estate or tenements, &c. :  
whether good pleading, - 101  
*See tit. Payment.*

### Pledges.

Where pledges *ad prosequendum* are  
omitted: whether it shall be cause  
of stay, or to avoid the judgment,  
92. 161. 594  
Whether money may be taken for  
pledge, - - - 446

### Possibility.

Cannot be transferred over, - 447  
Limitation of an estate upon a possibili-  
ty after a possibility, is not good, 577

### *Possessio Fratris.*

Cannot be of a dignity, - 601

### *Possessio Sororis, 87.*

### *Pramunire.*

Attainders therein, how they shall re-  
late, - - - 172

### Prerogative. *See King.*

### Prescription.

To have warran, how it ought to be  
pleaded, - - - 311  
That, *per legem terræ*, he ought to be  
discharged of the payment of tithes  
for wood spent in his house for fir-  
ing, or for fences, is not good, 113  
Where it lies for inhabitants or occupi-  
ers of land, - - - 418, 419  
Where prescription ought not to be per-  
sonal, but in the thing prescribed,  
325, 326. 419  
Prescription against a prescription can-  
not be, but the one ought to be tra-  
versed and put in issue, 432  
Prescription *de non decimando* of lands  
in the hands of the king or spiritual  
person; if they came to a layman,  
the prescription is determined: and  
so where a spiritual person hath a  
discharge by privilege, - - 94

### Presentment to Churches.

By the king, under what seal it ought  
to be, - - - 99, 100  
Whether the presentation or vacancy be  
traversable in a *quare impedit*, 61,  
62  
*Presentatio ad ecclesiam* is always to be  
intended of a parsonage, 74

### Principal and Accessary.

Accessary ought not to be condemned,  
but where the principal is attained,  
567

### Prison and Prisoner.

Every place where one is restrained of  
his liberty is a prison, - 210  
Prison of the king's bench and Fleet,  
how they may be removed to other  
places, - - - 210. 466  
Prisoners, how to be ordered, 14. 466  
Prisoner for felony, where he shall have  
counsel, and in what matters, 134.  
147. 175. 365  
*See more tit. Imprisonment.*

### Privileges.

Of the universities, 73. 74. 87. 88  
For serjeants at law, and their servants,  
to be sued in the common pleas, and  
not elsewhere, - - - 84, 85  
For attorneys and clerks of the courts,  
not to be pressed for soldiers, 11  
Not to bear offices in their parish, 389

### Privy.

Where actions shall be brought upon  
the privy of contract, and where  
upon the privy of estate, 143. 184.  
188

### *Procedendo.*

Granted into *London*, where the action  
is maintainable, which lies not in the  
king's bench, - - - 350. 487

### Process.

Where process mis-sued, is aided by  
the statute of *Jeofails*, - 90  
*Subpoena*,

# TABLE OF CONTENTS.

*subpoena*, how it ought to be served, 540

## Proclamations.

How they ought to be made and pleaded, 180; 181

## Prohibition.

What surmises shall be good in a prohibition to stay suits for tithes, 393  
 For suit for tithes of forest land purchased of the king, 94  
 To stay a suit for tithe of fish taken in rivers and in the sea, 264. 339  
 To stay a suit for tithe of young trees planted in a nursery upon purpose to be rooted up and sold to be planted in other parishes, 526  
 To stay suit for defamation for matter feasible at the common law, 110. 201. 285. 309. 340. 456. 457  
 Where the wife sues the husband in the spiritual court *propter scortitium*, &c. 16. 220  
 Whether grantable to stay a suit in an appeal for laying costs; the principal cause being discharged by the pardon, 46  
 To stay a suit in the ecclesiastical court against an administrator, to make distribution amongst the kindred, after debts and legacies paid, 62. 63. 194  
 Where the chancellorship of a bishop is granted for life, and he questioned in the ecclesiastical court concerning his ability to exercise that office, thereby to deprive him, a prohibition was granted, 65  
 For suing in the vice-chancellor's court at *Oxford* for temporal causes, 73. 88  
 To stay a suit in the spiritual court for a will of goods and lands, 94. 115. 165. 166. 395. 396. 397  
 Prohibition denied, because the party who prayed it had long and often before in that suit admitted the jurisdiction of those ecclesiastical courts, 97  
 Upon the statute 23. *Hen. 8.* for suing out of the diocese in the prerogative court for a legacy, upon a will proved there, 97. 162

To the high commissioners, where they sentence a cause after a general pardon, or meddle with a cause not warranted by *primo Elizabethæ*, although it be in their commission, 113. 114  
 Prohibition for two, if grantable where they severally sued in the spiritual court, 162  
 Where a prohibition may be granted after consultation upon the same libel, 208  
 Where it may be granted upon a suit for a mortuary, 238  
 If granted, and the party still prosecutes his suit in the spiritual court, he shall pay damages and costs for his contempt, 559  
 Where a prohibition lies upon surmise that the lands of the monasteries were discharged by the statute of 31. *Hen. 8.* from payment of tithe, 422. 423. 424. 425  
 Where a prohibition lies for a thing done in *Ireland*, 264  
 Prohibition to stay a suit in the *Stannaries*, 333  
 To the court of the *Marches of Wales*, 531. 595. 597  
 To the court of requests for suing there, where he was sued by the common law, or by the statute of limitations, 595. 596

## Property.

Whether the property of timber-trees, cut down in the time of the lessee for life, belongs to the lessor or lessee, 274  
 In creatures *feræ naturæ*, how to be claimed, 544. 545. 554

## Proviso.

Where a proviso in a statute may be given in evidence without pleading, &c. 315  
 How provisos in deeds are to be construed, 128. 129. 183

## Q.

### *Quare Impedit.*

Whether the incumbent, who comes *in pendente brevi*, shall plead in bar, 105  
 What



## TABLE OF CONTENTS.

What damages shall be recovered in a *quare impedit*, 145. 175. 342. 348

Presentation alledged and vacancy thereof by resignation or death: whether the presentment or the manner of vacancy may be traversed, and what matter is principally traversable, 50; 51. 105. 174. 380. 586

Whether a general pardon extends to pluralities, 354. 355. 356. 357. 358

The king may present to any church which he hath in right of his ward, either under the great seal, or under the seal of the court of wards, 99, 100

Whether a succeeding king may take advantage of a lapse incurred in the time of his predecessor, 335. 336

### *Que Estate.*

Where it ought to be shewn, 54. 575

### *Quod Ei Deforceat.*

Whether it lies at the common law, 444. 445

How it shall be brought in Wales, 178, 179. 262. 310. 311. 444. 445  
*See more in tit. Writ.*

### *Quo Warranto.*

Where amendment shall be in a *quo warranto*, - - - 144

## R.

### Rasure of a Deed.

Where it shall determine the interest passed thereby, - 398. 399

### Recognizance.

To keep the peace, how it ought to be taken, - 390

For the good behaviour, what acts shall be breach thereof, 498. 499

Recognizance by bail in the common

pleas, how it differs from the course of bail in the king's bench, 481

### Record.

Whether a record of the king's bench may be removed by *certiorari* into the chancery, and sent by *mittimus* into the other courts to be executed or otherwise, - 297. 298

Whether a record may be avoided by matter of *fact*, - 329

Where a record for the prolixity of the pleadings therein was ill and the clerk fined therefore, - 164

### Recovery.

Of damages in one action where it shall be a bar in another action, 35. 36

Against an infant by his guardian, who vouches, &c.: whether it shall bind the infant, - 307

Of the moiety of land, is good for a third part, where he who suffered the recovery had but a third part of the land recovered, - 110

Common recovery against a disseisor to an use, is good against him and his heirs, - 388. 389

*See tit. Common Recovery.*

Recusants and Papists, 10. 18.

504. 333.

### Relation.

How acts done in Term-time shall relate to the first day of the Term, 102

To what time a general pardon shall relate, - 9

Whether a judgment acknowledged shall relate to the first day of the Term or to the *quarto die post*, - 102

How deeds enrolled shall be construed to have relation to make acts good, 110. 217. 218. 571. 572

Relation of a *liberate* to the extent and return, 148. 149. 150

Of an attainder in a *præmunire*: whether it shall be for the time of the offence, - 172

Release.

## TABLE OF CONTENTS.

### Release.

Whether a release shall be from the time where a *nolle prosequi* is entered against the one defendant, and judgment is given against the other, 239.  
551  
Release by a covenantee, where it shall be a bar against the assignee of a covenant, the breach being after the assignment, 503  
Release by husband of his wife's suit in the spiritual court for defamation, is a good release *quoad* the cost, but not *quoad* the defamation, 222  
Two obligees jointly and severally; one being sued and pleading, the plaintiff enters a *retraxit*: whether this be a release and discharge to the other, 551

### Relief. See Ward.

### Remainder.

Whether the remainder of a term may be limited after the death of the first devisee, without issue then living; and whether it may be destroyed by the alienation of the first devisee, 230  
Remainder to the first son, tenant for life, who hath issue, and to his heirs; and so to the second son, remainder to his heirs: whether the fee vests presently, 364  
See Reversion.

### Remitter.

Where it shall be estopped by a warranty descended, 145

### Rent.

Ought to be demanded, although there be an obligation for the performance of all covenants and payments, 76.  
77  
Rent-charge for life suspended by acceptance of a lease for years of the land, is revived again by surrender of the lease, 101  
Rent charged by tenant for life, and confirmed by him in remainder within age, how it shall enure and how bind, 103

Where rent is granted of 14l. *per annum*, *habendum* 7l. from such a time for 38 years, and the other 7l. from another time for 28 years: and if the said 14l. *per annum* be behind, &c. that he may distrain, &c. whether this be one or several rents, 154

Where the lessee covenants to pay to his lessor and his heirs such an annual sum: whether this shall be accounted a rent reserved, 207

Where in a lease for years rent is covenanted to be paid to the lessor, his heirs and administrators: whether it shall be paid to the heirs and executors, 207

Whether rent reserved to one during the term shall go to the executors, 289

*Reservando et solvendo* rent to the husband and wife, upon a lease of land of the husband's: whether it shall be a good reservation to the wife, 288, 289

Reservation in a lease of the ancient rent, not mentioning what in certain, if it reserves or excepts any part anciently demised, it makes it a void reservation, 95, 96

In what county debt for rent ought to be brought (*See Debt.*)

Rent seck granted out of *Dale*, payable at *Sale*, demand thereof at *Dale* is good, 508

Rent seck granted, and 6d. delivered in name of seisin thereof, good, 508

Assise brought of a rent seck, 508

### Repleader.

Shall not be allowed where admission, institution and induction is pleaded, and issue is joined upon the admission and institution, where it ought to have been upon the induction, 380

### Replication.

Where a replication at large may be to a bar at large, 384

Intendment shall not make a replication good, 80, 94

If the replication be not good, yet if the bar be ill in substance, judgment shall be for the plaintiff, 5

Where a replication shall be ill, because he did not conclude his plea; *et hoc petit*

## TABLE OF CONTENTS.

*petit, quod inquiratur per patriam,*  
164  
Where there ought to be a special re-  
plication, - 514

### Repugnancy.

Where a repugnant clause to the pre-  
mises shall be void, and shall not de-  
stroy the premises, - 367  
Where a verdict shall be void, by rea-  
son of repugnancy, - 495

### Request.

Where it ought to be alledged in an *as-  
sumpt,* - 34, 35. 139  
Where special request ought to be al-  
ledged, - 386  
Where a man is bound to do a thing  
upon request, or reasonable request,  
299, 300  
*See tit. Demand.*

### Receipt.

Where receipt shall be after receipt,  
and what shall be a traverse where  
cause of receipt is alledged, 262, 263

*Rescous. See Execution.*

*Reservation. See Rent.*

### *Respondes Ouster.*

Where it shall be awarded, 9. 568

### Return.

What shall be a good return by the  
sheriff in a *scire facias* upon a recog-  
nizance against the heir and *terre te-  
nant,* 295, 296. 312, 313  
Upon an *extent* made after the death of  
the conusee, 450, 451, 452. 458,  
459  
Whether a return by the sheriff of a *ve-  
nire facias*, by his name and addition,  
*nuper vicecomes* be good or no, 189,  
190. 570  
In an *habeas corpus*, the returning the  
cause of the commitment of the pri-  
soner ought to be certain, 133

### *Retraxit.*

Two obligees jointly and severally, one  
being sued and pleading, the plaintiff  
enters a *retraxit*: whether this be a  
release and discharge to the other,  
551

### Reversion.

Whether a reversion only is granted,  
whether lands in possession pass there-  
by, - 400  
Where the lessor waves the possession,  
the reversion falls *in esse* before the  
lessee for years enter, - 110  
Grant of a remainder or reversion to  
commence *in futuro* is not good, 548

### Revocation.

What shall be said to be a revocation  
of a will, - 23, 24  
What shall be said to be a revocation  
of a former deed, - 472

### Riots.

Judgment in a riot and rescous, 506,  
507

## S.

### *Scire Facias.*

It cannot be upon a judgment in any  
court but in that wherein it is given,  
although it be removed in chancery  
by *certiorari et mandamus* by mitti-  
mus out of the king's bench, 34  
The first *scire facias* upon a recogni-  
zance to have execution, ought to be  
in the county where it was acknow-  
ledged, - 313  
Two *scire facias* into two several coun-  
ties, although death be alledged in  
the one, it shall not prejudice the  
other, - 518  
Granted against the administrator upon  
the recovery of a debt against an ex-  
ecutor,



## TABLE OF CONTENTS.

|                                                                                                                                      |               |
|--------------------------------------------------------------------------------------------------------------------------------------|---------------|
| Executor, who died intestate of a debt of the testator's,                                                                            | 167           |
| Whether <i>scire facias</i> lies to have execution, where the party taken in execution by <i>capias</i> escapes and rescues himself, | 240. 255      |
| To have execution of a judgment in debt by the husband,                                                                              | 208. 227      |
| Upon a recognizance of the father's against the heir and <i>terre-tenant</i> , how it ought to be returned,                          | 295. 312, 313 |
| Brought to avoid a patent of an office upon cause of forfeiture,                                                                     | 491, 492      |
| Whether one claiming by a consor by fine or other record, may maintain a distress without a <i>scire facias</i> ,                    | 598           |
| No writ of error lies in the exchequer-chamber upon a judgment in a <i>scire facias</i> ,                                            | 286. 302. 464 |
| Whether a <i>scire facias</i> may issue against the bail, where no <i>capias</i> is awarded against the principal,                   | 408           |
| Brought for not paying a fine assessed upon him at the justices seat of the forest,                                                  | 409           |
| Upon a recognizance of the good behaviour,                                                                                           | 498, 499      |

### Seal.

|                                                                                                        |               |
|--------------------------------------------------------------------------------------------------------|---------------|
| Where <i>submagn o sigillo Angliæ</i> ought to be pleaded, either in letters patents or proclamations, | 180, 181, 461 |
| What things shall pass under the exchequer seal,                                                       | 513, 528      |
| What shall pass under the seal of the court of wards,                                                  | 99, 100       |
| For institution and induction, it needs be under the episcopal seal,                                   | 342           |

### Seisin.

|                                                                                                 |            |
|-------------------------------------------------------------------------------------------------|------------|
| Where in an avowry seisin of the rent ought to be alledged, and wherein it is only traversable, | 82, 83, 84 |
| Jury finding a seisin of one coparcener is a sufficient finding for both,                       | 521        |

### Serjeants at Law.

|                           |                                |
|---------------------------|--------------------------------|
| Their manner of creation, | 1, 2, 3, 67, 85                |
| Created,                  | 12. 71. 84. 197. 567. 584. 600 |

|                                                                 |     |
|-----------------------------------------------------------------|-----|
| Their writ ought to be returnable at a day certain in Term,     | 3   |
| Where they and their servants ought to sue and be sued,         | 84  |
| Serjeant and chief justice, the same person sworn the same day, | 2   |
| Chief justice removed doth practise after as serjeant at law,   | 375 |

### Servant.

|                                                                           |     |
|---------------------------------------------------------------------------|-----|
| Where in justification he shall be in a better condition than his master. | 447 |
|---------------------------------------------------------------------------|-----|

### Sheriff.

|                                                                                                                                         |                         |
|-----------------------------------------------------------------------------------------------------------------------------------------|-------------------------|
| When he is to be chosen and nominated in the exchequer,                                                                                 | 13, 14, 595             |
| His oath, by what law, and how there may be an addition thereto,                                                                        | 25, 26                  |
| Whether he ought to add his name of officer to returns,                                                                                 | 189, 190, 572, 573, 595 |
| Whether he may execute a writ where himself is party,                                                                                   | 416                     |
| If he arrest one by <i>capias</i> , and returns not the writ at the day, it is a tortious arrest: but not so in his servant or bailiff, | 446, 447                |
| Upon escape of one in execution, it is at the parties election to sue the prisoner or the sheriff,                                      | 109                     |
| How he ought to execute judicial writs, notwithstanding the death of the party,                                                         | 450, 451. 458, 459      |
| What fees he ought to take for serving executions,                                                                                      | 287                     |
| What actions his executors are subject unto,                                                                                            | 539, 540                |
| Information against an under-sheriff for several foul misdemeanors,                                                                     | 569                     |

### Ship-money, 524. 601.

### Simony.

|                                                                                                                      |                    |
|----------------------------------------------------------------------------------------------------------------------|--------------------|
| What it is, and if it were an offence before the statute of 31. <i>Eliz.</i> whereof the common law took any notice, | 331. 351. 361      |
| Whether it be such an offence as shall avoid an <i>assumpsit</i> or obligation,                                      | 337. 351. 361. 429 |
| Whether an obligation entered by the parson to his patron to resign be simony,                                       | 180                |

### Soldiers.

# TABLE OF CONTENTS.

## Soldiers.

Whether their departing from their  
conductor without licence be felony, 71  
Clerks and attornies of the courts at  
*Westminster* ought not to be pressed  
for soldiers, 11

## Solicitor.

Who may be a solicitor, and whether  
he may take any fees, 160  
SOLICITOR GENERAL, his annual fee,  
376

## Statute Staple.

How it ought to be pleaded, 363  
The proceedings thereupon in chance-  
ry, 451. 452. 458. 459  
Whether one who claims by a conulor  
by fine or other record, may maintain  
a distress without a *seire facias*, 598

## Statutes.

How they are to be expounded, 34. 83.  
84. 85. 533  
Where a proviso in a statute may be gi-  
ven in evidence without pleading, 315  
Where a statute mis-recited shall make  
the declaration ill, 135. 136. 232.  
233  
Statutes of explanation must be constru-  
ed only according to the words, and  
not with any equity or intendment, 34  
*See tit. Damages.*

## EDWARD THE FIRST.

Statute of *Merton*, cap. 1. dower, 43  
Statute 12. *Edw.* 1. of *Rutland*, *quod*  
*ei de forceat*, 445  
Statute of *Winton*, 13. *Edw.* 1. hue and  
cry, 26. 37. 41. 158. 197. 336. 379  
*Westm.* 2. c. 1. *de denis conditionalibus*,  
whether it extends to copyhold, 43.  
533  
*Westm.* 2. c. 2. pledges found upon re-  
plevin, 446. 594  
*West.* 2. c. 3. *cui in vita*, 43  
*West.* 2. c. 4. *quod ei de forceat*, 445  
*West.* 2. c. 20. *elegit*, 44

*West.* 1. c. 46. casting down of hedges,  
&c. 280, 281. 439. 446. 580

## EDWARD THE SECOND.

Stat. 12. *Edw.* 2. c. 5. return by she-  
riffs, 189  
12. *Edw.* 2. for essoigns, 341

## EDWARD THE THIRD.

4. *Edw.* 3. c. 17. actions by execu-  
tors, 297  
9. *Edw.* 3. c. 3. appearance, 564  
18. *Edw.* 3. sheriff's oath, 26  
25. *Edw.* 3. c. 1. lapse of benefices,  
335. 336  
25. *Edw.* 3. c. 2. treason, 167. 332.  
333  
25. *Edw.* 3. c. 19. execution against  
the king's debtors, 390  
31. *Edw.* 3. c. 11. administrators,  
106. 201  
31. *Edw.* 3. c. 17. the sheriff's town,  
275  
50. *Edw.* 3. c. 46. prohibitions, 268

## RICHARD THE SECOND.

2. *Rich.* 2. c. 5. *de scandalo magna-*  
*rum*, 135. 136  
15. *Rich.* 2. c. 2. forcible entries, 486

## HENRY THE FOURTH.

2. *Hen.* 4. c. 11. the admiralty, 296.  
297. 603  
12. *Hen.* 4. c. 9. return of jurors, 134

## HENRY THE SIXTH.

8. *Hen.* 6. c. 9. forcible entries, 201  
8. *Hen.* 6. c. 12. jeofails, 203. 278.  
564  
23. *Hen.* 6. c. 10. sheriffs and their  
officers, 287. 309. 438. 448. 449

## EDWARD THE FOURTH.

1. *Edw.* 4. c. 1. fines and amerce-  
ments in sheriff's tourns, 275

## HENRY THE SEVENTH.

3. *Hen.* 7. c. 1. the star-chamber, 168  
3. *Hen.*

## TABLE OF CONTENTS.

|                               |                                                                           |
|-------------------------------|---------------------------------------------------------------------------|
| Stat. 3. <i>Hen. 7. c. 2.</i> | carrying a woman away against her will, 483. 485. 488. 493                |
| 3. <i>Hen. 7. c. 10.</i>      | costs, where the defendant sueth a writ of error, 145. 401. 425. 590. 591 |
| 4. <i>Hen. 7. c. 24.</i>      | fines, 175. 183. 194. 435                                                 |
| 7. <i>Hen. 7. c. 1.</i>       | soldiers, 71, 72                                                          |
| 11. <i>Hen. 7. c. 20.</i>     | jointures, 244                                                            |

### HENRY THE EIGHTH.

|                           |                                                                               |
|---------------------------|-------------------------------------------------------------------------------|
| 3. <i>Hen. 8. c. 1.</i>   | soldiers, 71, 72                                                              |
| 7. <i>Hen. 8. c. 4.</i>   | damage, and costs to the avowant, 498 533, 534. 535                           |
| 14. <i>Hen. 8. c. 5.</i>  | physicians, 256. 257                                                          |
| 21. <i>Hen. 8. c. 5.</i>  | administration and probate of testaments, 106. 201, 202                       |
| 21. <i>Hen. 8. c. 6.</i>  | mortuaries, 238                                                               |
| 21. <i>Hen. 8. c. 13.</i> | pluralities, 146. 354. 355. 356. 357. 428. 475. 476                           |
| 21. <i>Hen. 8. c. 19.</i> | damages and costs to the avowant, 498. 533, 534. 542                          |
| 23. <i>Hen. 8. c. 4.</i>  | selling beer, &c. 112                                                         |
| 23. <i>Hen. 8. c. 9.</i>  | suing out of the diocese, 97. 162. 339                                        |
| 23. <i>Hen. 8. c. 15.</i> | costs upon non-suit, 542                                                      |
| 24. <i>Hen. 8. c. 5.</i>  | felons, 544                                                                   |
| 26. <i>Hen. 8. c. 6.</i>  | indictments in cases of felonies to be enquired of in adjoining counties, 332 |
| 26. <i>Hen. 8. c. 13.</i> | forfeiture for treason, 427, 428, 429, 430                                    |
| 27. <i>Hen. 8. c. 10.</i> | uses, 44. 218                                                                 |
| 27. <i>Hen. 8. c. 16.</i> | enrollments, 109, 110. 217. 218                                               |
| 27. <i>Hen. 8. c. 28.</i> | monasteries, 422, 423, 424                                                    |
| 31. <i>Hen. 8. c. 1.</i>  | jointenants, 44                                                               |
| 31. <i>Hen. 8. c. 13.</i> | monasteries to be discharged of tithes, 422, 423, 424                         |
| 32. <i>Hen. 8. c. 1.</i>  | disposing land, &c. 34                                                        |
| 32. <i>Hen. 8. c. 2.</i>  | limitations, 81                                                               |
| 32. <i>Hen. 8. c. 9.</i>  | champerry, 43. 232                                                            |

|                           |                                                         |
|---------------------------|---------------------------------------------------------|
| 32. <i>Hen. 8.</i>        | assignees, 24                                           |
| 32. <i>Hen. 8. c. 28.</i> | leases, &c. 22, 23. 44. 158                             |
| 32. <i>Hen. 8. c. 30.</i> | jeofails, 90. 278. 281                                  |
| 32. <i>Hen. 8. c. 32.</i> | partition betwixt jointenants and tenants in common, 43 |
| 32. <i>Hen. 8. c. 34.</i> | grantees of reversion, 44                               |
| 32. <i>Hen. 8. c. 36.</i> | fines to bar the issue in tail, 435                     |
| 32. <i>Hen. 8. c. 37.</i> | executors to recover rents, &c. 471, 472                |
| 33. <i>Hen. 8. c. 1.</i>  | false tokens, 564                                       |
| 23. <i>Hen. 8. c. 20.</i> | forfeiture in treason, 427, 428. 429, 430               |
| 32. <i>Hen. 8. c. 26.</i> | of <i>Wales</i> , 342                                   |
| 37. <i>Hen. 8. c. 17.</i> | doctors of law, &c. 258, 259                            |

### EDWARD THE SIXTH.

|                          |                                             |
|--------------------------|---------------------------------------------|
| 1. <i>Edw. 6. c. 7.</i>  | discontinuance of process, 104              |
| 1. <i>Edw. 6. c. 24.</i> | chantries, 81. 148. 249. 455, 456           |
| 2. <i>Edw. 6. c. 13.</i> | not setting out tithes, 513                 |
| 2. <i>Edw. 6. c. 2.</i>  | 13. tithes of barren heath, 208             |
| 5. <i>Edw. 6. c. 4.</i>  | striking in church, 464, 465                |
| 5. <i>Edw. 6. c. 14.</i> | ingrossers, for stallers, &c. 231. 314, 315 |
| 5. <i>Edw. 6. c. 15.</i> | carriers, 588                               |

### PHILIP AND MARY.

|                                         |                             |
|-----------------------------------------|-----------------------------|
| 1. <i>Mary, c. 9.</i>                   | physicians, 256. 257        |
| 1. & 2. <i>Phil. &amp; Mary, c. 12.</i> | distresses impounded, 561   |
| 4. & 5. <i>Phil. &amp; Mary, c. 3.</i>  | taking a maid, &c. 465, 465 |

### ELIZABETH.

|                                      |                                                                                       |
|--------------------------------------|---------------------------------------------------------------------------------------|
| 1. <i>Eliz. the high commission,</i> | 113, 114. 220. 222                                                                    |
| 1. <i>Eliz. c. 19.</i>               | leases and grants by bishops, 16, 17. 47, 48, 49. 50. 95, 96. 258. 279, 280. 556. 557 |
| 5. <i>Eliz.</i>                      |                                                                                       |



# TABLE OF CONTENTS.

## Soldiers.

Whether their departing from their  
conductor without licence be felony, 71  
Clerks and attornies of the courts at  
*Westminster* ought not to be pressed  
for soldiers, 11

## Solicitor.

Who may be a solicitor, and whether  
he may take any fees, 160  
SOLICITOR GENERAL, his annual fee,  
376

## Statute Staple.

How it ought to be pleaded, 363  
The proceedings thereupon in chance-  
ry, 451. 452. 458. 459  
Whether one who claims by a conutor  
by fine or other record, may maintain  
a distress without a *scire facias*, 598

## Statutes.

How they are to be expounded, 34. 83,  
84. 85. 533  
Where a proviso in a statute may be gi-  
ven in evidence without pleading, 315  
Where a statute mis-recited shall make  
the declaration ill, 135. 136. 232,  
233  
Statutes of explanation must be constru-  
ed only according to the words, and  
not with any equity or intendment, 34  
*See tit. Damages.*

## EDWARD THE FIRST.

Statute of *Merton*, cap. 1. dower, 43  
Statute 12. *Edw.* 1. of *Rutland*, *quod*  
*ei deforceat*, 445  
Statute of *Winton*, 13. *Edw.* 1. hue and  
cry, 26. 37. 41. 158. 197. 336. 379  
*Westm.* 2. c. 1. *de donis conditionalibus*,  
whether it extends to copyhold, 43.  
533  
*Westm.* 2. c. 2. pledges found upon re-  
plevin, 446. 594  
*West.* 2. c. 3. *cui in vita*, 43  
*West.* 2. c. 4. *quod ei deforceat*, 445  
*West.* 2. c. 20. *elegit*, 44

*West.* 2. c. 46. casting down of hedges,  
&c. 280, 281. 439. 446. 580

## EDWARD THE SECOND.

Stat. 12. *Edw.* 2. c. 5. return by she-  
riffs, 189  
12. *Edw.* 2. for *essoigns*, 341

## EDWARD THE THIRD.

4. *Edw.* 3. c. 17. actions by execu-  
tors, 297  
9. *Edw.* 3. c. 3. appearance, 564  
18. *Edw.* 3. sheriff's oath, 26  
25. *Edw.* 3. c. 1. lapse of benefices,  
335. 336  
25. *Edw.* 3. c. 2. treason, 167. 332,  
333  
25. *Edw.* 3. c. 19. execution against  
the king's debtors, 390  
31. *Edw.* 3. c. 11. administrators,  
106. 201  
31. *Edw.* 3. c. 17. the sheriff's tourn,  
275  
50. *Edw.* 3. c. 46. prohibitions, 268

## RICHARD THE SECOND.

2. *Rich.* 2. c. 5. *de scandalo magna-*  
*tum*, 135, 136  
15. *Rich.* 2. c. 2. forcible entries, 486

## HENRY THE FOURTH.

2. *Hen.* 4. c. 11. the admiralty, 296,  
297. 603  
12. *Hen.* 4. c. 9. return of jurors, 134

## HENRY THE SIXTH.

8. *Hen.* 6. c. 9. forcible entries, 201  
8. *Hen.* 6. c. 12. *jeofails*, 203. 278.  
564  
23. *Hen.* 6. c. 10. sheriffs and their  
officers, 287. 309. 438. 448. 449

## EDWARD THE FOURTH.

1. *Edw.* 4. c. 1. fines and amerce-  
ments in sheriff's tourns, 275

## HENRY THE SEVENTH.

3. *Hen.* 7. c. 1. the star-chamber, 168  
3. *Hen.*

# TABLE OF CONTENTS.

|                                                                                                    |  |
|----------------------------------------------------------------------------------------------------|--|
| Stat. 3. <i>Hen.</i> 7. c. 2. carrying a woman away against her will, 483. 485. 488. 493           |  |
| 3. <i>Hen.</i> 7. c. 10. costs, where the defendant sueth a writ of error, 145. 401. 425. 590. 591 |  |
| 4. <i>Hen.</i> 7. c. 24. fines, 175. 183. 194. 435                                                 |  |
| 7. <i>Hen.</i> 7. c. 1. soldiers, 71, 72                                                           |  |
| 11. <i>Hen.</i> 7. c. 20. jointures, 244                                                           |  |

## HENRY THE EIGHTH.

|                                                                                                        |  |
|--------------------------------------------------------------------------------------------------------|--|
| 3. <i>Hen.</i> 8. c. 1. soldiers, 71, 72                                                               |  |
| 7. <i>Hen.</i> 8. c. 4. damage, and costs to the avowant, 498. 533. 534. 535                           |  |
| 14. <i>Hen.</i> 8. c. 5. physicians, 256. 257                                                          |  |
| 21. <i>Hen.</i> 8. c. 5. administration and probate of testaments, 106. 201. 202                       |  |
| 21. <i>Hen.</i> 8. c. 6. mortuaries, 238                                                               |  |
| 21. <i>Hen.</i> 8. c. 13. pluralities, 146. 354. 355. 356. 357. 428. 475. 476                          |  |
| 21. <i>Hen.</i> 8. c. 19. damages and costs to the avowant, 498. 533. 534. 542                         |  |
| 23. <i>Hen.</i> 8. c. 4. selling beer, &c. 112                                                         |  |
| 23. <i>Hen.</i> 8. c. 9. suing out of the diocese, 97. 162. 339                                        |  |
| 23. <i>Hen.</i> 8. c. 15. costs upon nonsuit, 542                                                      |  |
| 24. <i>Hen.</i> 8. c. 5. felons, 544                                                                   |  |
| 26. <i>Hen.</i> 8. c. 6. indictments in cases of felonies to be enquired of in adjoining counties, 332 |  |
| 26. <i>Hen.</i> 8. c. 13. forfeiture for treason, 427. 428. 429. 430                                   |  |
| 27. <i>Hen.</i> 8. c. 10. uses. 44. 218                                                                |  |
| 27. <i>Hen.</i> 8. c. 16. enrollments, 109. 110. 217. 218                                              |  |
| 27. <i>Hen.</i> 8. c. 28. monasteries, 422. 423. 424                                                   |  |
| 31. <i>Hen.</i> 8. c. 1. jointenants, 44                                                               |  |
| 31. <i>Hen.</i> 8. c. 13. monasteries to be discharged of tithes, 422. 423. 424                        |  |
| 32. <i>Hen.</i> 8. c. 1. disposing land, &c. 34                                                        |  |
| 32. <i>Hen.</i> 8. c. 2. limitations, 81                                                               |  |
| 32. <i>Hen.</i> 8. c. 9. champerty, 43. 232                                                            |  |

|                                                                                   |  |
|-----------------------------------------------------------------------------------|--|
| 32. <i>Hen.</i> 8. assignees, 24                                                  |  |
| 32. <i>Hen.</i> 8. c. 28. leases, &c. 22. 23. 44. 158                             |  |
| 32. <i>Hen.</i> 8. c. 30. jeofails, 90. 278. 281                                  |  |
| 32. <i>Hen.</i> 8. c. 32. partition betwixt jointenants and tenants in common, 43 |  |
| 32. <i>Hen.</i> 8. c. 34. grantees of reversion, 44                               |  |
| 32. <i>Hen.</i> 8. c. 36. fines to bar the issue in tail, 435                     |  |
| 32. <i>Hen.</i> 8. c. 37. executors to recover rents, &c. 471. 472                |  |
| 33. <i>Hen.</i> 8. c. 1. false tokens, 564                                        |  |
| 23. <i>Hen.</i> 8. c. 20. forfeiture in treason, 427. 428. 429. 430               |  |
| 32. <i>Hen.</i> 8. c. 26. of <i>Wales</i> , 342                                   |  |
| 37. <i>Hen.</i> 8. c. 17. doctors of law, &c. 258. 259                            |  |

## EDWARD THE SIXTH.

|                                                                     |  |
|---------------------------------------------------------------------|--|
| 1. <i>Edw.</i> 6. c. 7. discontinuance of process, 104              |  |
| 1. <i>Edw.</i> 6. c. 24. chantries, 81. 148. 249. 455. 456          |  |
| 2. <i>Edw.</i> 6. c. 13. not setting out tithes, 513                |  |
| 2. <i>Edw.</i> 6. 2. 13. tithes of barren heath, 208                |  |
| 5. <i>Edw.</i> 6. c. 4. striking in church, 464. 465                |  |
| 5. <i>Edw.</i> 6. c. 14. ingrossers, forstallers, &c. 231. 314. 315 |  |
| 5. <i>Edw.</i> 6. c. 15. curriers, 588                              |  |

## PHILIP AND MARY.

|                                                                        |  |
|------------------------------------------------------------------------|--|
| 1. <i>Mary</i> , c. 9. physicians, 256. 257                            |  |
| 1. & 2. <i>Phil.</i> & <i>Mary</i> , c. 12. distresses impounded, 561  |  |
| 4. & 5. <i>Phil.</i> & <i>Mary</i> , c. 3. taking a maid, &c. 465. 465 |  |

## ELIZABETH.

|                                                                                                              |  |
|--------------------------------------------------------------------------------------------------------------|--|
| 1. <i>Eliz.</i> the high commission, 113. 114. 220. 222                                                      |  |
| 1. <i>Eliz.</i> c. 19. leases and grants by bishops, 16. 17. 47. 48. 49. 50. 95. 96. 258. 279. 280. 556. 557 |  |
| 5. <i>Eliz.</i>                                                                                              |  |

# TABLE OF CONTENTS.

Stat. 5. *Eliz.* c. 4. using a trade not be-  
ing apprentice, &c. 316. 347.  
499. 516, 517  
5. *Eliz.* c. 4. binding out appren-  
tices, - 179  
5. *Eliz.* c. 9. perjury, 99. 353,  
354  
5. *Eliz.* c. 9. witnesses *ad testifi-*  
*candum*, 522, 523. 540, 541  
5. *Eliz.* c. 22. leather, 588  
5. *Eliz.* c. 23. *excommunicate ca-*  
*piendo*, - 583  
13. *Eliz.* c. 7. bankrupts, 149. 568,  
569  
13. *Eliz.* c. 10. leases by spiritual  
persons, - 22. 84  
18. *Eliz.* c. 3. bastards, 341. 350,  
351. 436. 470, 471  
18. *Eliz.* c. 13. amendments, 92.  
203. 223. 278. 282  
27. *Eliz.* c. 5. demurrers, 185  
27. *Eliz.* c. 8. errors in the exche-  
quer chamber, 142. 286. 300.  
464. 514  
27. *Eliz.* c. 13. hue and cry, 26.  
37. 38. 40. 212, 213  
27. *Eliz.* c. 16. carriers, 588  
29. *Eliz.* c. 4. the sheriff's fees  
upon executions, 287  
31. *Eliz.* c. 6. simony, 330, 331.  
425  
35. *Eliz.* c. 2. popish recusants.  
39. *Eliz.* c. 15. robbing in a dwel-  
ling house, - 473, 474  
43. *Eliz.* c. 2. overseers for the  
poor, 92, 93. 394, 395  
43. *Eliz.* c. 4. charitable uses, 40.  
525, 526

## JAMES THE FIRST.

1. *Jac.* 1. 11. polygamy, 461,  
462, 463  
1. *Jac.* 1. 12. witchcraft, 141  
1. *Jac.* 1. c. 22. carriers, 588,  
589  
3. *Jac.* 1. c. 4. popish recusants,  
504  
3. *Jac.* 1. c. 8. *superfedeas* upon  
a writ of error, - 59  
3. *Jac.* 1. c. 15. relief of the poor,  
572  
4. *Jac.* 1. c. 3. costs to defendants,  
29  
7. *Jac.* 1. c. 5. double costs to  
officers, 175. 219. 285, 286.  
467

Stat. 21. *Jac.* 1. c. 4. informations, 112  
146. 316  
21. *Jac.* 1. c. 13. jeofails, 92. 203,  
204. 278. 312, 313. 480. 564  
21. *Jac.* 1. c. 16. limitation of ac-  
tions, 115. 139. 145. 163. 294,  
295. 381. 405. 513  
21. *Jac.* 1. c. 16. costs in action,  
163. 307  
21. *Jac.* 1. c. 19. bankrupts, 149,  
185. 188. 190. 549, 550. 568,  
569  
21. *Jac.* 1. c. 23. utter barristers,  
7  
21. *Jac.* 1. c. 12. tendering dama-  
ges in trespass, - 264  
21. *Jac.* 1. *superfedeas*, &c. 487

## CHARLES THE FIRST.

3. *Car.* 1. c. 4. bastard children,  
341. 350, 351. 436. 470, 471

## Suggestion.

In a prohibition shall be tried by two  
witnesses, - - - 208

## Summons and Severance.

Of one executor, the other proceeds  
and recovers: whether mention need  
be made of him who is summoned  
and severed, &c. - 420, 421

## Sunday.

Process served upon it punished, &c. 602

## Superfedeas.

To a *procedendo*, where it is mis-award-  
ed and well allowable, notwithstand-  
ing the statute of 21. *Jac.* 1. 487  
Awarded to an inferior court, because  
their proceedings were not before an  
utter-barrister, - - 79

Superstitious Uses, 248, 249.  
455, 456.

Surrender.



# TABLE OF CONTENTS.

## Surrender.

What shall be a surrender, and how to be pleaded, 101, 102

If a patentee for life or years of the king, of land or office, takes a new lease or patent thereof for another estate: whether it be a surrender, 197, 198

By a copyholder for life, to the use of another, to whom the lord granteth it for his life; he dies: whether the first copyholder shall have the land back again as the remnant of the estate in possibility remaining in him, 204, 205

Surrender *dimissionis prædictæ*, and not of the estate or tenements, &c.: whether good pleading, 101

Grantee of a rent for life accepts of a lease for years of part of the same land, and surrenders the said lease: whether the rent remains suspended during the years, or be revived presently by a surrender, 101, 102

See Copyholds.

## T.

## Tail.

What shall make an estate tail, 22

Whether it shall be by a devise to a brother and his heirs; and for default of such heirs, to his sister and her heirs, 57, 58

How an estate tail in the king may be barred, 96, 97

*Habendum* to husband and wife, to the use of them and the heirs of their bodies: whether it be an estate tail or for life only, 230, 231, 245

Where an estate tail is barred by fine: whether it may be revived by confirmation of him who hath the fee, 478

See tit. Tenant.

## Tales.

*De circumstantibus*; where it shall be 341

*Tales by proviso* for the defendant cannot be in the same Term that the jurors make default, 484

## Tenant.

Tenant in tail, reversion to the king, makes a feoffment, and after is attainted of treason: whether the estate or right of the tail is forfeited by the statutes of 26. Hen. 8. c. 17. and 33. Hen. 8. c. 27. 427, 428, 429, 430

Tenant in common may be by a devise to three, their heirs and assigns, part and part alike, 75

Tenant at will makes a lease for years, rendering rent: the lessee enters and pays the rent: whether the lessee be in as lessee or disseisor, 302, 303

See tit. Tail.

## Tender.

Whether tender of rent ought to be demanded, where one is obliged to perform all covenants and payments of a lease, 76

When and where tender of amends for trespass by the statute of 21. Jac. 1. c. 12. is to be made, 264

Whether traverse shall be of the tender of a marriage in *valore maritagii*, or in an action of the case in nature thereof, 503

## Term.

For what purpose the Term shall be said to begin the first day, and when upon the *quinto die post*, 14, 102

Term adjourned to Reading, 13

See tit. Adjournment.

## Testament.

Rules concerning exposition of testaments, 51, 52, 369

By whom a testament or will may be made, and how revoked, 51, 52, 161, 198

Where the testament of a *feme covert* shall be good, 26, 219, 220

Feoffment to such uses as shall be declared by his will; he deviseth the land

## TABLE OF CONTENTS.

land as a declaration of the uses; whether it shall enure as a declaration of the land itself, 39  
 Probate of testaments, where to be made, 395, 396, 397  
*See tit. Devises and Prohibition.*

### Teste.

How the *teste* of writs judicial shall be made upon the death of THE CHIEF JUSTICE, 393

### Time.

What time one shall have where he is bound to do a thing after request or reasonable request, 299  
 To make a thing parcel in reputation, what time is required, 169, 308  
 is not material that the time of disturbance should be alledged in a declaration, when it is but collateral to the promise, 497

### Title.

What shall be a sufficient title in a declaration to a water-course, 499, 500

### Traverse.

Where it shall be to the manner of vacancy alledged in a *quare impedit*; and what matter is principally traversable, 61, 62, 105, 586  
 Whether if it be taken where it ought not to be, it makes not the plea double or ill; and where it ought to be specially alledged upon a demurrer, 61, 62, 105  
 Where the taking a traverse may be perilous, 324, 328  
 Where and in what cases there may be a *traverse upon a traverse*, 105, 586  
 Where a traverse shall or ought to be to the matter to induce a traverse, 174  
 Inducement to a traverse shall not be so precisely pleaded as another plea, 442  
 Whether the inducement thereunto ought always to be sufficient in matter, 266, 336

Whether traverse ought to be a special cause of receipt, 226  
 Where there is no absolute confessing and avoiding there ought to be a traverse  
 Where the traverse of the day shall make the plea ill, 501  
 Where the traverse shall be of the tender of a marriage in *valore maritagii*, or in an action upon the case in nature thereof, 503  
 Where the defendant makes title by a later grant from the same party, there the plaintiff needs not traverse it, 581

### Treason.

To go in a warlike manner with a multitude to assault a privy-counsellor at his house is treason, 583  
 The breaking of a prison wherein traitors are in durance and causing them to escape is treason, although the parties did not know there were any traitors there, 583  
 There is nothing treason at this day but what is made so by the statute 25. *Edw. 3. c. 2.* 117, 333  
 No words are treason unless made so by some particular statute, *i. b.*  
 Judgment in treason for speaking traitorous words against the king, 333  
 Judgment in treason for counterfeiting money, 383  
 Petit treason in the wife to murder her husband, and judgment thereupon, 531, 532

### Trespass.

Whether action of trespass lies where bail sufficient is tendered to a SERJEANT upon an arrest upon a plaint in *London*, and he refuse to accept thereof, 196  
 It is no plea in trespass for cutting his nets and oars, that he cut them because he found the plaintiff fishing with them in his waters, 228  
 For killing an hawk, without shewing what kind of hawk it was, and that she was reclaimed, whether good, 18  
Trespass

## TABLE OF CONTENTS.

Trespass for fishing *in separali piscaria sua* and taking *pisces suos ibidem*, 554

Trespass of assault and battery 2 *Julii*: the defendant justifies *en son defence*

9 *July*, 514, 515

In another place, &c. 572, 573

See *tit. Action.*

### Trial.

A fact in one county cannot be tried in another, 247

Whether upon indictments traversed trial may be the same day or sessions, 315, 340, 438, 448

Trial of a prisoner by virtue of a commission of *oyer and terminer*, without any commission of gaol delivery, may be the same day of the enquiry, 583

Where trial may be in an *English* county adjudged for a fact committed in *Wales*, 245, 248

Upon a record of *nisi prius* varying in substance from the plea roll, the trial is merely void, 20, 21, 194

Trial of an issue upon a *nisi prius* roll where there is a misprision of the jurors: whether it be good or amendable, 275

Trial by ten of the principal pannel and two of the *tales*, where there were but twenty-three in the *venire facias* returned: whether it be good, or is aided by any of the statutes, 223, 224

Where twenty-three only are returned in the *venire facias*, and in the *habere corpora* twenty-four are returned, and the twenty-fourth juror sworn: whether it be good, or aided by the statutes, 278

Trial of an issue by six jurors is not good, although alledged to have been used so by custom, 260

Whether the trial of sheriff or no sheriff such a day, when process was returned, shall be by the patent *Reven*, or *per pair*, 421

Custom of *London* which concerns all the citizens, shall be tried *per pair*, 517

Trial of institution shall be by the bishop; of induction *per pair*, 380

Cap. Car.

Where there may be trial in the spiritual court of a release or other matter triable by the course of the common law, and where not, 237, 238

### Trover and Conversion.

Where the day and place of the *trover* ought to be mentioned, 262, 525

See *tit. Action.*

### Tourn de Viscount.

What time it shall be held, and how the amercements shall be levied, 275, 276

See *Amercement.*

### Timber.

What shall be said to be timber-trees, 531

See *tit. Waste.*

### Tithes.

What shall be good cause of discharge of tithes, 393

Whether tithes shall be paid of forest lands in the hands of the king's purchasers, which were ever discharged of tithes in the king's hands, 94

Whether tithe shall be paid for abbey lands dissolved by the statute 27. *Hen.* 8. c. 20. 422, 423, 424

What shall be called *minuta decima*, 28

Whether tithe shall be paid for houses in *London*, 596

Whether an *ejectione firme* lies for tithes, 301

Whether they be within the statute of 8. *Hen.* 6. c. 20. to have restitution, 201

Tithes are payable for firewood, or wood for fences, unless there be a special custom to discharge them, 113

Whether tithe shall be paid for the pasturage of sheep fed to be spent in an house within the parish, 237

Whether tithe shall be paid for fish taken in the sea or great rivers, 264, 339

U n Whether



## TABLE OF CONTENTS.

|                                                                                     |     |
|-------------------------------------------------------------------------------------|-----|
| Whether for conies taken in a warren,                                               | 339 |
| Whether for young trees planted in a nursery upon purpose to be rooted up and sold, | 522 |
| Whether tithes shall be paid for honey,                                             | 560 |
| Whether it shall be paid of the bees themselves,                                    | 404 |

### V.

#### Variance.

|                                                                                                            |                       |
|------------------------------------------------------------------------------------------------------------|-----------------------|
| Betwixt the writ or bill and the count, where it shall be aided by the statute of jeofails, and where not, | 272.<br>281, 282. 325 |
| Betwixt the count and the indenture pleaded, where it makes the judgment erroneous,                        | 314. 418              |

#### *Venire Facias.*

|                                                                                                                                                           |                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Of what place, and how it shall be,                                                                                                                       | 17. 150. 162. 480 |
| Bearing date before the action brought, and yet the trial thereupon good,                                                                                 | 38. 90. 91        |
| With the <i>teste</i> or day of return, varying from the roll, and before the <i>teste</i> of the writ, and the issue tried thereupon, whether amendable, | 38. 203,<br>204   |
| <i>Venire facias de novo</i> awarded, where the trial is upon a record of <i>nisi prius</i> varying from the roll, although the plaintiff be non-suited,  | 203, 204          |
| Where <i>venire facias de novo</i> shall be awarded,                                                                                                      | 284. 312          |
| Whether a <i>venire facias</i> may be from the ward of a city,                                                                                            | 150. 164, 165     |
| <i>Venire facias</i> against two, where the one is dead, after issue and trial thereupon: whether the judgment against the survivor be good,              | 426               |
| Where in a <i>venire facias summamitus est</i> was returned, where it ought to have been <i>attachiatus est</i> : whether good,                           | 91                |
| Appeal by the son and heir of the death                                                                                                                   |                   |

of his father against two, that the one *proditorius*, the other *felonice*, conspired his death: whether there ought to be one or several *venire facias* for the trial thereof, 532  
See *tit.* Trial.

#### Verdict.

|                                                                                                                                                                                                  |                       |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| If it do find matter varying from the declaration, where it shall hurt the declaration, and where not,                                                                                           | 151                   |
| Where it shall make an ill plea or issue good,                                                                                                                                                   | 6. 152, 153. 168. 191 |
| Verdict general as the plea is good, and not void for uncertainty,                                                                                                                               | 219                   |
| Verdict special not finding the plaintiff's title, and yet good,                                                                                                                                 | 22                    |
| Verdict finding the issue precisely for the plaintiff or defendant, and new matter contrary to it, is good according to the issue, and void for the surplusage found,                            | 130, 131. 198.<br>212 |
| Verdict find damages 20l. (to be paid in such a commodity, if by law it may be) it is a good verdict for the damages found, and void for the residue,                                            | 219                   |
| Verdict, where void by reason of repugnancy,                                                                                                                                                     | 495                   |
| Upon a writ of enquiry of waste, it finds that he made waste in less quantity, and doth not find <i>quod nullum aliud fecit vastum</i> : whether it be good,                                     | 414. 453              |
| That the defendant <i>assumpsit</i> , where there be two several promises alleged: whether it be good,                                                                                           | 219                   |
| Where it gives all in damages in an assise, for six years arrearages of a rent-seck, not mentioning it to be for arrearages, and yet shall be good,                                              |                       |
| That the church is void <i>per tempus semestre</i> , although it finds not the time of the avoidance, is good,                                                                                   | 345                   |
| Obligation with a condition to pay upon the 31st of September: payment is pleaded to be at that day: and the verdict finds, there was no payment the said 31st of September, yet a good verdict, | 338                   |
| Verdict certainly given and uncertainly returned, how it may be amended,                                                                                                                         | 338                   |
| After verdict matter of form shall not be prejudicial,                                                                                                                                           | 90. 91<br>Where       |

## TABLE OF CONTENTS.

Where two contrary verdicts be given,  
the first cannot be avoided, unless by  
error or attain, 590  
See *tit. Venire Facias and Judgment.*

### *Vi et Armis.*

Where the omission of those words in  
indictments and declarations will  
make them vitious, 378. 407

### Vicar.

Of what things he shall have tithes, as  
*minutæ decimæ*, 28

### Viſtuals and Viſtuallers.

What ſhall be ſaid to be viſtuals, and  
who viſtuallers, &c. 113. 231. 232

### Vill.

Vill and pariſh ſhall be intended all one  
and the ſame, if the contrary appears  
not, 182

See *tit. Fine.*

### Unity of Poſſeſſion.

Where and what things it ſhall extin-  
guiſh, 419

### Voucher.

Whether one may vouch the king with  
a voucher over, 96, 97

See *tit. Infant.*

### Uſes.

Where the limitation of the uſes ſhall  
be for the limitation of the eſtate ;  
and where it ſhall be conſtrued larger  
than the eſtate, 239

Uſes limited upon recovery, which is  
good by *eſtoppel*, ſhall bind the reco-  
veree and his heirs, and all claiming  
under him, 389

Uſes contingent, by what acts they may  
be deſtroyed, 102, 103

Who ſhall have the benefit of contin-  
gent uſes, and by what acts they may  
be tranſferred, ſuſpended, or deſtroy-  
ed, 359

Uſes raiſed upon conſideration of blood,  
529, 530

### Uſury.

What ſhall be ſaid uſury within the ſta-  
tutes, 283

It ſhall not be uſury where the agree-  
ment is not corrupt, 501

Permitted to be paid, if it exceeds not  
that which is allowed by the ſtatutes,  
273. 491

### Outlawry.

Reverſed by plea : whether it be within  
the ſtatute of limitations, 194, 195

Whether the outlawry of a juror ſhall  
be good cauſe to diſcharge an indict-  
ment, 147

Where the defendant after imparlance  
pleads outlawry, and upon *nul tiel*  
*record* pleaded fails of the record,  
judgment ſhall be abſolutely given,  
and not a *reſponde ouſter*, 566

## W.

### Wager of Law.

Where it lies, 182

In inferior courts it is not allowed, 112

### Wales.

Whether a *certiorari* lies to remove a  
record or indictment there found, 34.

Where judgment is given in debt againſt  
a defendant in *Wales*, who dieth in-  
teſtate, and one here takes letters of  
adminiſtration: whether any execu-  
tion may be in *Wales*, 34

Whether a writ of appeal may be  
brought  
U u 2

## TABLE OF CONTENTS.

brought in the next *English* county  
for a murder in *Wales*, 247, 248

Whether the courts in *Wales* might  
write to the archbishop or bishops in  
*England* to certify bastardy, matrimo-  
ny, &c. 247, 342

How process are there returnable from  
day to day, and not confined to fif-  
teen days betwixt the *teste* and return,

179. 254

They have jurisdiction to hold plea of  
lands not held of the king, 172

Trials may be there made in some places  
by six jurors only, 260

Customs in *Wales*, 171, 172, 231, 238.  
247, 248, 254, 260, 332, 342, 344.

562. 570

*See tit.* Court of the Marches.

### Ward and Wardship.

Whether a distress be maintainable for  
relief, or *pro valore maritagii*, 533;

534

Whether the heir shall pay relief to  
other lords at his full age, where his  
land had been in ward to the king, by  
reason of other lands held *in capite*,

534

*See Quare Impedit.*

### Warranty.

Where warranty descended and attached  
upon the heir in remainder is defeat-  
ed by the entry of the tenant for life,  
who is not bound: whether it be  
defeated *quoad* the heir, 145

Where warranty shall be said to be  
collateral, and where it shall bar  
him who had right before, 156

Where it is determined by the returning  
of the fee to the feoffor, 305, 369

Whether warranty upon a feoffment to  
the use of the feoffee for his life, re-  
mainder for life, and after to the feof-  
for and his heir, shall bind for the  
benefit of him in remainder, 369,

370, 371

What shall be said to be a warranty  
commencing by disseisin, 370, 433.

484

Where found by special verdict, al-  
though not pleaded, yet shall bind,

145

How the recovery in value shall be in  
a warranty against the king, and

2

how he shall recover over in value,

96, 97

### Warren.

### Waste.

Whether the assignee of the lessor shall  
have action of waste for cutting down  
timber-trees during the lease for  
years, 242, 243

Wherein waste alledged *in domibus  
gardinis et pomariis*, and a writ of  
enquiry of waste awarded, the jury  
finding the waste in cutting down  
two trees, where the waste was as-  
signed in cutting down twenty trees,  
and they do not find *quod nullum aliud  
fecit vastum*: whether it be good,

453

What judgment shall be given upon a  
*venire facias* in waste, where several  
issues be joined, and the verdict is  
found in part for the plaintiff and  
part against him, 381

If in a writ of enquiry of waste there  
be more than twelve sworn: whe-  
ther it be erroneous, 414

*See tit.* Writ.

### Waver de Action.

The king may waive a demurrer or issue,  
but not any other against the king,  
without the attorney-general's con-  
sent, 347

Whether the plaintiff in an action of  
waste brought for the cutting down  
and carrying away of a timber tree  
may waive that action and bring an  
action of *trover*, 242, 243

### Ways.

Whether the erecting of a gate upon  
the highway to open and shut with  
the hand be a nuisance, 184, 185

Who ought to repair highways, 336

Wife. *See* Baron and Feme,  
and Feme Sole.

Wills. *See* Testament and De-  
vise.

### Witnesses.

*Ad testificandum* make default, 522,

523, 540, 541  
Perjured,



# TABLE OF CONTENTS.

Rejoiced, 124

## Words.

No words are treasonable, unless made  
so by some statute, 125

Of such words as are not usual the law  
doth not take any consufance, 554.

See it. Action fur Case, and Exposition. 555

## Wood and Weld.

Whether *minuta decima*, 28

## Writ.

THE REGISTER is the rule of *original*  
*writs*, but *judicial writs* may be  
framed according to the direction  
and discretion of the court, 527

Where it shall be awarded to the coro-  
ners, where the sheriff is plaintiff or  
defendant, 415, 416

Writ of right of advowson, the manner  
of proceedings therein, 511. 574.  
589, 590, 591, 592

Writ of *quod ei desorceat*, where it may  
be general and count special in what  
action he will, 444, 445

Writ demanding 15. *acr. jumpna et*  
*brueria*: whether it be uncertain,  
179

Writ of enquiry of waste is not a mere  
inquest of office, but is nature of a  
verdict; whereof an attain lies, 414

Writ to enquire of the preserving of in-  
closures; how and in what cases it  
shall be, 280, 281. 439, 440

Writ to certify that J. S. is a *baron*,  
and that process should not be award-  
ed against him, but as against a peer  
of the realm, 205, 206

Writ awarded to a bishop out of *Wales*;  
and whether it may be to the archbi-  
shop, 342

Writ of restitution awarded upon an  
ejectment for tithes, 201

Awarded to the ecclesiastical court, for  
the admitting and swearing of a  
churchwarden,

For the admitting and swearing of the  
clerk of a parish, 589

Writ of privilege, to discharge an at-  
torney or clerk of the court from be-  
ing pressed for a soldier, 11

From being constable, &c. 389

Writ of privilege for sergeants at law  
and their servants, to be sued only in  
the common pleas, 84, 85

Writ of *distringas villata circumadja-  
cent. ad leuand. fepes*, &c. upon  
the statute of 13. *Edw. 1.* 280, 281.

439, 440. 580

*Jamq. noster \* Agricola, posteritati narratus et traditus, superstes erit.*

TACITUS in vita JULII AGRICOLÆ, Socii sui.

\* *Fin. yes.*